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IN THE SUPREME COURT OF THE UNITED STATES

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Petitioner,

v.

ANTHONY GRAVES,
Respondent.

On Petition For Writ of Certiorari to the
Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in determining that Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecution allegedly failed to disclose that Robert Carter claimed to have committed the murders alone.

2. Whether Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the prosecution's failure to disclose Carter's statement that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

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PETITION FOR WRIT OF CERTIORARI

The lower court's decision does not conflict with various state courts of last resort or United States Courts of Appeals. Nevertheless, the Court should grant this petition because the United States Court of Appeals for the Fifth Circuit erroneously held that Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecution allegedly failed to disclose that Graves' co-defendant Robert Carter claimed to have committed the murders alone.

The United States Court of Appeals for the Fifth Circuit also erroneously held that Graves' rights under *Brady v. Maryland,* 373 U.S. 83 (1963) were violated by the prosecution's failure to disclose Carter's statement that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit reversed the district court's judgment denying habeas relief with instructions for the lower court to grant Graves' petition fo writ of habeas corpus based on *Brady v. Maryland. Graves v. Dretke*,442 F.3d 334 (5th Cir. 2006); *see also* Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on March 3, 2006. Thus, Respondent's petition for writ of certiorari is timely filed on or before June 1, 2006. SUP. CT. R. 13.3. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"[N]or shall any State deprive any person of life, liberty, or property without due process of law. . ." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals summarized the relevant facts in its opinion on state habeas review:

> A Burleson County Texas grand jury indicted [Graves] in May 1994 for intentionally and knowingly causing the stabbing and shooting deaths of one adult and five children. The evidence at trial showed that in the early morning hours of August 18, 1992, [Graves] and an accomplice, Robert Carter, killed all six victims in a home belonging to the adult victim. [Graves'] motive was anger at the female homeowner for receiving a job promotion he thought his mother should have received. The five slain children just happened to be in the house at the time. After stabbing and shooting the victims, applicant and Carter used gasoline to burn the house. When police officers first questioned [Carter], he implicated himself and [Graves] in the murders and arson. Both [Graves] and Carter later testified before the grand jury and denied any involvement. While [Graves] and Carter were both in county jail awaiting trial, however, several witnesses overheard them make incriminating statements to each other. FN2
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> FN2. [Graves] and Carter occupied cells directly opposite one another and conversed across this distance. While delivering food to the jail, a

> Burleson County Jail employee overheard [Graves] say to Carter, "[w]e fucked up big time." Another employee heard [Graves] tell Carter, "[k]eep your damn mouth shut. I done the job for you. Make them make their own damn case." That same evening, a jailer overheard [Graves] tell [Carter], "[y]eah, motherfucker, I did it, keep your mouth shut!"

The State tried Robert Carter first. A jury convicted Carter of capital murder and sentenced him to death. He then testified against [Graves] at [Graves'] trial in exchange for the State's promise not to prosecute Carter's wife, who had also been indicted for this capital murder.FN3 [Graves] presented an alibi defense, offering evidence that he had spent the evening of the murders with his girlfriend, Yolanda Mathis. He claimed that [Carter] "framed" him.

> FN3. Shortly before his own execution, the accomplice, Robert Earl Carter, was deposed in prison and recanted his trial testimony. Carter claimed that [Graves] had nothing to do with the murders; that he, Carter, committed the murders alone; and that he had never known [Graves] to carry a knife. Several witnesses at [Graves'] trial had testified, however, that [Graves] owned a switchblade knife that matched "like a glove" the wounds that caused the death of five of the six victims.

After a twelve day trial, the jury convicted [Graves] of capital murder. The jury answered "yes" to article 37.071 special issues 1 and 2 and "no" to special issue 3. Accordingly, on November 3, 1994, the trial court assessed

the death penalty against applicant.

Ex parte Graves, 70 S.W.3d 103. 105 (Tex. Crim. App. 2002) (original footnotes).

II. Facts Relating to the Fourteenth Amendment Claim

The district court adopted the federal magistrate's summary of the facts of the offense and evidence adduced at the federal evidentiary hearing regarding Graves' *Brady* claims as follows:

> In the early morning hours of August 18, 1992, Bobbie Davis, Nicole Davis, Demitra Davis, Brittany Davis Lea'Erin Davis, and Jason Davis were murdered in Burleson County, Texas. Bobbie and Nicole both suffered wounds from a knife, a hammer, and a .22 caliber gun. The remaining four children, aged four to nine, were stabbed to death. Robert Carter, the father of four-year-old Jason Davis, was soon arrested for his involvement in the killings. He was subsequently convicted in 1994 of capital murder and sentenced to death.[1]

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[1] During his testimony at Graves' trial, Carter explained his and Graves' motives for the murders. Carter told the jury that a week or two before the instant offense, he and Graves met and discussed their respective problems with Bobbie Davis and her daughter, L.D., Carter's girlfriend. L.D. had informed Carter that she was filing a paternity suit against him to arrange for the support of their son, Jason Davis. Carter feared that the court would order an amount of child support which would ruin his credit record. Also, Carter had continued to date L.D. after marrying Cookie Carter, Graves' first cousin. Further, Cookie had recently given Carter an ultimatum demanding that he end his relationship with

Carter's wife, Cookie, was also indicted for the offense of capital murder. Attorneys Calvin Garvie and Lydia Clay-Jackson, who defended Graves at trial, believed this indictment to be a sham based on false evidence presented to the grand jury and obtained only in order to pressure Carter to testify against Graves. Evidentiary Hearing Transcript ("EHT") at 129, 168. Nevertheless, Burleson County District Attorney Charles Sebesta, who prosecuted Graves, insisted that the State believed from early on that Cookie participated in the killings and that all evidence pointed to the involvement of three people. *Id.* at 57, 98. Indeed, the State's theory from the beginning of the trial was that at least three people had acted together in the murders. *Id.* at 174. Texas Ranger Coffman testified at trial that his investigation showed "at least three and possibly four" perpetrators were in the Davis home when the murders occurred.

Prior to the beginning of Graves' trial, the District Attorney's office had been in negotiations with Carter and his appellate attorney for Carter's testimony against Graves. According to Sebesta, no final agreement on the terms had been reached prior to Carter's arrival in Brazoria County for Graves' trial, although any final plan was to involve the use of a polygraph exam before he testified. The early

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L.D. Similarly, L.D. pressured Carter to end his relationship with Cookie. According to Carter, Graves was angry with Bobbie Davis, whom Graves believed received a promotion that his mother, Dorris Curry should have received due to Bobbie's relationship with the unit director at the Brenham State School where the two women were employed.

discussions also involved Carter's condition that the State would not ask him questions about his wife's role in the murders. *Id.* at 54.

Sebesta met with Carter in the early evening of October 21, 1994. According to Sebesta, Carter almost immediately claimed, "I did it all myself, Mr. Sebesta. I did it all myself." *Id.* at 60. When Sebesta stated that he knew that was not true because of the number of weapons used, Carter quickly changed his story and claimed that he committed the murders with Graves and a third man called "Red." *Id.* at 61, 94, 95. Carter had earlier implicated a person named "Red" during the murder investigation, and the State believed that Theresa Carter may have been known by that nickname. [Graves'] Ex. 9 at 24. When Sebesta proposed that "Red" was actually Cookie, Carter denied it and agreed to take a polygraph exam. EHT at 95.

Since the polygraph examiner had been out sick that day, he was called to come in to administer the exam. *Id.* at 96. The report states that Carter signed a polygraph release statement, had the exam explained to him, and then changed his story once more before the exam was given by stating that he had killed the Davis family with Graves but without "Red." [Graves'] Ex. 9 at tab 4. The interviewer then posed the following question to Carter: (1) ["W]as your wife, Theresa, with you [at the time of the murders]?" and (2) "[W]hen you refer to 'Red' in your statement, are you talking about your wife, Theresa?" *Id.* Carter answered "no" to both questions. The polygraph examiner concluded that Carter was not being truthful in either response. *Id.* When the polygraph results were explained to him, Carter once more changed his story. He now admitted that Cookie was involved in the murders with himself and Graves. He

also stated that he had invented the character "Red" but later admitted that Cookie was sometimes called "Red." *Id.* When Sebesta asked him if Theresa had used the hammer in the murder, Carter answered "yes." EHT at 96.

In addition to the tentative deal to forego questions about Cookie in exchange for testifying against Graves, the State had also been working on a broader agreement that would allow Carter to accept a life sentence rather than death if his case were reversed on appeal. This required Carter to testify against both Graves and Cookie. *Id.* at 67. By the time the October 21 meeting concluded, he had tentatively assented to do so, though no final agreement was reached. *Id.* at 62, 103, 105. The next morning, however, Carter refused to testify against Cookie and reverted to the initial terms already worked out with the State. Both Carter and Sebesta then accepted the tentative agreement as the final deal for his testimony.

At the evidentiary hearing [Graves' attorney] Garvie denied that he knew before, or at any time during, trial that Carter had told Sebesta he killed the Davis family himself. Sebesta testified that he mentioned the statement to Garvie on the morning Carter testified. *Id.* at 149. The Court accepts Garvie's version of the event based on his credibility as a witness and as being consistent with his vigorous defense of Graves at trial. Sebesta did reveal part of the polygraph results on the morning of October 22 when he told the trial judge: "last night at 8:30 Carter took a polygraph[,] and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But obviously, we can't go into polygraphs here, but I think counsel is certainly entitled to know that." Garvie asked no questions about what the polygraph involved. Garvie's

co-counsel testified that it did not occur to the defense to inquire into Sebesta's statement because they believed the indictment against Cookie was unfounded. EHT at 134. Nor did it fit the defense's theory of the case. According to Ms. Clay-Jackson, the defense thought that at least two people were involved in the killings but that Cookie was not one of them. *Id.* at 122. The State then called Carter to the stand and revealed to the jury that he was testifying in exchange for an agreement that questions would not be asked about his wife.

Graves' habeas attorneys appear to have first learned of Carter's statement, "I did it all myself," in 1998. On June 19, 1998, Graves' former attorney took a deposition from Carter in which he claimed to have acted alone. *Ex parte Graves*, No. 40,812-01 at 97 ff. That statement was excluded from the record by the state court as inherently unreliable because Graves' attorney failed to notify the State, as required by law, in order to allow cross-examination. Carter again recanted his trial testimony in a May 18, 2000, deposition attended by both Sebesta and Graves' current counsel. Sebesta later appeared on the Geraldo Rivera show Deadly Justice on September 3, 2000, and repeated Carter's self-confession. Sebesta stated: "yes, and at that point he [Carter] did tell us, 'Oh, I did it myself. I did it.' He did tell us that." [Graves'] Ex. 1.

See Appendix B at 2-5 (Magistrate's Report and Recommendation).

III. State and Federal Court Proceedings

Graves was indicted, convicted, and sentenced to death for murdering Bobbie Joyce Davis, Nicole Davis, Lea'Erin Davis, Brittany Davis, Jason Davis, and Denitra Davis in the same criminal transaction. Tr 549-55. The Texas Court of Criminal Appeals affirmed Graves' conviction and sentence. *Graves v. State*, No. 72,042 (Tex. Crim. App. April 23, 1997); *Graves v. State*, 950 S.W.2d 374 (Tex. Crim. App. 1997) (Keller, J., concurring). Graves did not seek certiorari review in this Court.

In June 1998, Graves filed an application for writ of habeas corpus in state court. After an evidentiary hearing, the convicting court filed findings of fact and conclusions of law recommending relief be denied. The Court of Criminal Appeals subsequently ordered the case filed and set for submission on two claims, and ultimately denied relief. *Ex parte Graves*, No. 73,424 (Tex. Crim. App. Feb. 9, 2000). Graves then filed a subsequent application for writ of habeas corpus alleging the instant claims, which was dismissed as an abuse of the writ. *Ex parte Graves*, No. 40,812-02 (Tex. Crim. App. Feb. 16, 2000). Next, Graves filed a second subsequent application for state habeas relief in March 2000, and an amendment to his second subsequent application in July 2000, which the Court of Criminal Appeals set for submission to determine whether Graves had a statutory or constitutional right to the effective assistance of state habeas counsel, which, if proven, would entitle him to review of his second subsequent application. On January 2, 2002, the court answered in the negative and dismissed the application as an abuse of the writ. *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). The court denied rehearing on March 6, 2002.

Meanwhile, on Graves' motion, the United States District Court for the Western District of Texas granted a deposition of recanting

trial witness Robert Earl Carter, who was set to be executed. *Ex parte Graves*, No. A-00-CA-130-JN (W.D. Tex.) (Order of Feb. 22, 2000). Carter was deposed on May 18, 2000. The Western District then dismissed the case. *Id.* (Order of June 2, 2000). The United States District Court for the Southern District of Texas subsequently granted an agreed scheduling motion. *See Graves v. Johnson*, No. G-00-221 (S.D. Tex.) (Order of May 23, 2000). Before Graves could file his petition in the Southern District, however, the Court of Criminal Appeals filed and set for submission Graves' second subsequent state habeas application. Accordingly, the district court granted Graves' motion to abate federal proceedings until the state court proceedings had been completed.

After the Court of Criminal Appeals dismissed Graves' successive application on January 2, 2002, and denied rehearing, the district court granted Graves' motion to lift its abatement order and reinstate federal proceedings.

Graves timely filed the instant federal habeas petition on May 13, 2002. On September 6, 2002, District Judge Samuel Kent issued an opinion denying relief. Subsequently, on October 9, 2002, the district court denied a certificate of appealability ("COA") on each of Graves' allegations.

In two opinions delivered on August 15, 2003, and November 13, 2003, respectively, the Fifth Circuit determined that Graves had established cause for the procedural default of his *Brady* claims because the State did not disclose Carter's statements until after Graves filed his initial habeas petition. *Graves v. Cockrell*, 351 F.3d 143, 154 (5th Cir. 2003); *Graves v. Cockrell*, 351 F.3d 156, 158 (5th Cir. 2003). The appellate court also granted COA on the issue of whether the district court erred in denying Graves' *Brady* claims and remanded the case to the district court for an evidentiary

hearing. *Id.* After an evidentiary hearing conducted on September 28-29, 2004, before the district court magistrate, the district court adopted the magistrate's report and recommendation and entered and order and opinion denying relief on Graves' claims but granting Graves' request for COA. *Graves v. Dretke*, No. G-00-221 (S.D. Tex. (Magistrate's Report and recommendation, November 8, 2005); *Graves v. Dretke*, No. G-00-221 (S.D. Tex.) (Orders of February 16, 2005, and March. 17, 2005); *see also* Appendixes B, C, D, and E respectively.

Following additional briefing and oral argument on the merits in the Fifth Circuit, the Court of Appeals reversed the district court judgment. *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006); *see also* Appendix A. The instant petition followed.

REASONS FOR GRANTING THE WRIT

The court below erred in concluding that Graves' rights under *Brady v. Maryland* were violated by the State's failure to disclose two statements made by Robert Carter to former district attorney Charles Sebesta on the eve of Carter's testimony against Graves. *Graves v. Dretke*, 442 F.3d at 345; *see also* Appendix A. According to Graves, Carter's first statement - - "I did it all myself" - - exonerated Graves and claimed sole responsibility for the murders. *Id.* Also, according to Graves, Carter's second statement, made later that same evening, inculpated himself and implicated his wife Theresa "Cookie" Carter in the murders. *Id.* Graves urged that the district court erred in determining that neither of the statements, either considered individually or together, were material. The Court of Appeals agreed. However, the appellate court erred. Given the substance of the statements, the State's and defense's theories of the case, and the evidence presented to the jury, Graves failed to demonstrate a reasonable probability that the result of the proceeding would have been different had the statements been

disclosed.

To obtain federal habeas relief based on a violation of due process under *Brady v. Maryland*, Graves bore the burden of demonstrating that (1) the State suppressed evidence, (2) favorable to the defense, and (3) material as to issues of guilt or punishment. *Brady*, 383 U.S. at 87. Evidence is "material" within the meaning of *Brady* if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed; a "reasonable probability" is one sufficient to undermine confidence in the outcome. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Because Graves failed to meet these standards, the lower court incorrectly determined that Carter's statements were material to Graves' conviction and erred in reversing the judgment of the district court.

I. Carter's "I did it myself" Statement is Immaterial.

The Fifth Circuit determined that Carter's mid-trial statement that he acted alone was "particularly significant because it was the first statement Carter made that implicated himself without also implicating Graves." *Graves v. Dretke*, 442 F.3d at 341; *see also* Appendix A. The court noted that at trial, the State emphasized Carter's consistency in naming Graves as an accomplice. *Id.* Due to the number of inconsistent statements Carter had made, the court reasoned that the State faced a difficult job of persuading the jury that Carter was a credible witness. *Id.* As such, the court concluded, "had the defense been able to cross-examine Carter on the suppressed statement, this may well have swayed one or more jurors to reject Carter's trial version of the events." *Id.* But, this analysis ignores the fact that the jury also heard testimony from jailers who overheard Graves inculpate himself and express a desire to protect his cousin Cookie. Contrary to Graves' assertions and the Fifth Circuit's conclusion, Carter's statement was not material. As

the district court reasoned:

> The exculpatory statement fitted neither the State's three-person theory (which the jury heard) nor the defense's belief that at least two people were involved. Both trial attorneys testified that the number of victims and weapons used made it reasonable to conclude that more than one person was involved. EHT at 125, 162. It is difficult to see why there is a reasonable probability a jury would have believed Carter acted alone when Graves' own counsel admitted it was reasonable to find otherwise. Obviously, Carter's testimony that he and Graves did the deeds themselves does not fully match the three-person theory, but the jury also knew that Carter was protecting Cookie.

See Appendix B at 9 (Magistrate's Report and Recommendation).

Likewise flawed is the appellate court's reasoning that the statement is material because it would have shown that Carter only implicated Graves under coercion. Importantly, this reasoning ignores the fact that Carter had implicated Graves from the very beginning. More importantly, it ignores Ranger Coffman's testimony that Carter first implicated Graves on August 23, 1982, the night he was arrested, some five days after the murders. 37 SR[2] 3583-97; SX 191. Thus, the jury knew that Carter had implicated Graves long before he made the statement in question to Sebesta on the eve of his testimony at Graves' trial.

Finally, there is no reasonable probability that the "I did it myself" statement could have impeached Carter's credibility as a

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[2] "SR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page number. "SX" refers to the State's trial exhibits, followed by exhibit number.

witness. As the district court properly recognized, the impeachment value of this statement must be analyzed within the context in which it was given. The court must take into consideration all of the statements heard by the jury, including Carter's admission that he had previously given four to five different accounts, and that his current testimony differed from his own trial. *See* Appendix B at 13 (Magistrate's Report and Recommendation). The district court noted that "the jury also knew the terms of Carter's agreement with the State and the motive that might have given [sic] him for testifying against Graves in order to protect his wife." *Id.* Given the aforementioned, the district court logically concluded:

> In light of the fact that Carter's claim to have acted alone contradicted the evidence, and the fact that the jury already had considerable evidence before it of Carter's multiple inconsistencies and credibility issues, the Court cannot find that it is reasonably probable that disclosing the statement would have led to a different outcome.

Id. In light of the foregoing, the Fifth Circuit's holding to the contrary is in error and certiorari review is warranted.

II. Carter's Statement Implicating Cookie, Himself, and Graves is Immaterial.

The Fifth Circuit determined that "the district court did not reach the materiality of the statement." *Graves v. Dretke*, 442 F.3d at 343; *see also* Appendix A. However, a review of the district court's Report and Recommendation belies this conclusion. The district court addressed both the materiality and the exculpatory[3]

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[3] Contrary to the Fifth Circuit's conclusion, the second statement is not exculpatory. First, while the statement implicates Carter's wife Cookie, it also implicates Graves. Both of Graves' trial counsel admitted this at the federal

nature of the second statement, soundly reasoning:

> [Graves] argues that Carter's statement was material and exculpatory because the State believed "at least two persons" committed the murder. He claims evidence that Cookie was one of the killers would haves significantly weakened the argument that Graves was also involved because it accounted for the two-person scenario without him. [Graves' Post-hearing] Brief at 14. [Graves'] argument works only if "at least two persons" is construed to mean that "only two persons" were responsible for the Davis murders. Had the prosecution believed that only two people were involved, then Carter's statement would have been material because it could have deflected suspicion away from Graves as the second killer. But the State never presented such a theory to the jury. It consistently believed that at least three persons were involved and presented its case accordingly. EHT at 98. Carter's statement implicating Graves and Cookie fits that theory and would not have been exculpatory on the basis [Graves] argues. Garvie confirmed this at the hearing by admitting that any implication of [Graves] and Cookie together would not have helped the defense. EHT at 173. The fact that Carter's statement matched up with the State's three-person theory could even have lent it credibility, which would have been damaging to [Graves].
>
> The statement could also have harmed [Graves'] attack on the State's motive theory. The State believed that Graves was motivated, in part, by his close relationship with

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evidentiary hearing. EHT at 117, 158. Furthermore, as the district court noted, the statement is consistent with the State's "at least three person" theory of the case.

> Cookie, who was his cousin. The defense used Tremetra Ray to show that the two cousins were not close at all. As stated above, however, Ray's testimony contained the central claim that Cookie and Carter were at home together when the murders occurred. Carter's confession that Cookie was involved would have directly contradicted this and could have led the jury to question Ray's credibility as a defense witness even more than it did.

See Appendix B at 16-17 (Magistrate's Report and Recommendation).

Furthermore, the Fifth Circuit's determination that the State's suppression of this second statement thwarted Graves' ability to establish Cookie as the second perpetrator is also flawed. *Graves v. Dretke*, 442 F.3d at 343; *see also* Appendix A. First, a review of the record indicates that defense counsel may have consciously avoided implicating Cookie. Indeed, several instances in the record reflect that defense counsel objected to implications by the State that Cookie was involved. 38 SR 3727-29, 3788-89; 40 SR 4001, 4036; 42 SR 4203. And, as the district court pointed out, "this assertion overlooks the nature of the testimonial agreement itself." *See* Appendix B at 17 (Magistrate's Report and Recommendation).

> Obviously, the State could not limit the defense's ability to cross-examine Carter about Cookie if they so desired. The agreement only limited the State's right to do so. Graves' attorneys knew the State had indicted Cookie; that it was arguing a three-person theory; that Carter was very eager to protect Cookie; and that he had agreed to testify against Graves only in exchange for not being asked questions about he by the State. The defense therefore had the freedom and the opportunity to cross-examine Carter

about his wife's involvement.

Id. The district court's materiality analysis is clearly supported by the record. Graves failed to demonstrate a reasonable probability that disclosing the statement would have led to a different outcome. Therefore, Fifth Circuit erred in concluding that Graves had demonstrated a *Brady* violation. This issue merits certiorari review.

III. The Combined Effect of Carter's Two Statements Does Not Make Them Material.

Holding that the statements considered together were material, the court below reasoned,

> had the two statements been timely furnished to Graves he could have persuasively argued that (1) the murders were committed by Carter alone or by Carter and Cookie; and (2) Carter's plan from the beginning was to exonerate Cookie, but a story that he acted alone was not believable, so he implicated Graves so the prosecution would accept his story and decline to prosecute Cookie.

Graves v. Dretke, 442 F.3d at 343-44; *see also* Appendix A. But, considering all of the evidence the jury heard, the combined effect of the statements is not material and, as the district court observed, "could well have been damaging to [Graves]." *See* Appendix B at 17 (Magistrate's Report and Recommendation).

The jury was aware that Carter had implicated Graves from the outset. Moreover, this was not the first time the State had discussed a deal with Carter for his testimony against Graves. Indeed, the record reflects that a tentative agreement had been hammered out some six weeks before Carter's testimony. Importantly, Carter had already tentatively indicated a willingness to testify against Graves;

the sticking point was whether he would answer any questions involving Cookie.

Despite Graves' assertions to the courts below, Carter did not suddenly change his story on the eve of his trial testimony from "I did it all myself" to one that implicated Graves to strike a deal with the State to protect his wife. To the contrary, the evidence demonstrates that Carter had begun discussing a deal with the State at least six weeks before his trial testimony. 8 SR 3-4. In fact, Carter's defense attorney Walter Prentice testified before the jury regarding the terms of Carter's agreement with the State. 36 SR 3468-69. Moreover, the jury was aware that Carter first implicated Graves in the murders in August 1992, long before he made his deal with the State regarding Cookie, and long before his testimony at trial. 37 SR 3583-97; SX 191, 200 (statements by Carter to Texas Ranger Coffman). Thus, had the defense tried to make the argument to the jury that Carter had only implicated Graves on the eve of his testimony to protect Cookie, the State could have easily rebutted it with the foregoing evidence.

As the district court correctly concluded, the trial record indicated a tentative agreement with Carter to testify against Graves in exchange for not being asked about Cookie. EHT at 8 (citing 8 SR 3-4; EHT at 51). Thus, the district court correctly concluded, "the deal finally struck between Carter and the State was not the trigger for obtaining his testimony against [Graves] in the manner that [Graves] argues or that Carter would otherwise have testified to [Graves'] innocence." *See* Appendix C at 7 (Order and Opinion).

The record also belies Graves' claim that the defense had no evidence that Cookie was the second person at the crime scene. To the contrary, the defense was aware that Cookie had been indicted for the offense. EHT at 156. Furthermore, the defense was aware that Carter had shown deception on the polygraph in answering

questions about Cookie because Sebesta had stated so on the record. 35 SR 3360. Likewise, the State presented evidence to the jury through Carter's defense attorney Walter Prentice that Carter refused to testify as to any involvement of Cookie. 36 SR 3468-69; EHT at 156. The State also introduced evidence from jail personnel that Carter and Graves were trying to protect Cookie. 36 SR 3546; EHT at 157. These facts gave the defense ample information to point the finger at Cookie in an attempt to create reasonable doubt with respect to Graves, had the defense chosen to do so.

Given the record as a whole, the district court correctly reasoned that the combined effect of the statements did not raise a reasonable probability that the outcome of the trial would have been different:

> Although [Graves'] attorneys provide no argument on this issue, the disclosure of both of Carter's statements does not lead to a different conclusion. In fact, the combined effect could well have been damaging to [Graves]. The jury could not have believed both of Carter's contradictory claims. If they had been disclosed, this could have undermined any credibility the jury might otherwise have given to Carter's allegation that he acted alone. Unlike that claim, the statement implicating Cookie and Graves identified the missing third person the State had argued was involved. Given that the defense itself did not believe one person committed the murder, it is very unlikely the jury would have believed Carter's one-person version when it also had his three-person story that matched the evidence. The jury could also have taken Carter's three-person statement as more credible because it was strongly against his well-known desire to protect Cookie. Moreover, if both statements had been raised on cross-examination, the State would presumably have been able to point to Carter's two additional October 21 versions that implicated Graves

> (numbers 6 and 7 above).[4] This would have reinforced the consistency with which Carter had implicated Graves because, other than the exculpatory statement and the discredited grand jury testimony, all of Carter's accounts listed above named him as a participant in the murders.

See Appendix B at 17-18 (Magistrate's Report and Recommendation). As the district court correctly concluded, "Carter's undisclosed statements do not meet the materiality standard when considered alone or in combination, and [Graves] has not shown a *Brady* violation in this case." *Id.* The Fifth Circuit's holding to the contrary merits certiorari review by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

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For Criminal Justice

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[4] The court's parenthetical "(numbers 6 an 7 above)" refers to its numbered inventory of all of Graves' statements. *See* Appendix B at 12-13 (Magistrate's Report and Recommendation).

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UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 05-70011

Anthony GRAVES,
Petitioner-Appellant,
v.

Doug DRETKE, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Petitioner Anthony Graves appeals the district court's denial of his writ of habeas corpus. Because we conclude that the statements suppressed from the defense were both exculpatory and material, we reverse the judgment of the district court with instructions to grant Graves' writ of habeas corpus.

I.

Anthony Graves was convicted of capital murder and sentenced to death in 1994 for the capital offense of murdering six people in the same transaction. The procedural history of Graves' conviction, post-conviction appeals and writ petitions is presented in our previous opinions addressing Graves' application for certificate of appealability. This court originally granted COA only on Graves' Brady claim that the state failed to disclose to Graves that key prosecution witness and Graves' co-defendant Robert Earl Carter informed the district attorney that Graves was not involved in the

charged crime on the day before he testified to the contrary at Graves' trial. *Graves v. Cockrell*, 351 F.3d 143 (5th Cir.2003) ("Graves I"). On rehearing, this court modified its order and also granted COA on Graves' claim that the state's failure to disclose Carter's alleged statement implicating his wife in the crimes violated Graves' rights under Brady. *Graves v. Cockrell*, 351 F.3d 156 (5th Cir.2003) ("*Graves II*"). The case was remanded to the district court

> for an evidentiary hearing to determine: (1) the substance of the alleged statement described above, along with Carter's statement allegedly exonerating Graves; (2) whether Graves was aware of these statements or exercised due diligence to discover these statements; (3) whether the state's failure to disclose these statements was material to Graves' defense under Brady; and (4) for a determination of whether Graves is entitled to relief on these claims.

Graves II, 351 F.3d at 159. COA was denied on all other claims.

On remand, an evidentiary hearing was held before Magistrate Judge Froeschner who, after reviewing briefly the facts of the crime, made the following factual findings in his report and recommendation.

Carter's wife, Cookie, was also indicted for the offense of capital murder. Attorneys Calvin Garvie and Lydia Clay-Jackson, who defended Graves at trial, believed this indictment to be a sham based on false evidence presented to the grand jury and obtained only in order to pressure Carter to testify against Graves. Evidentiary Hearing Transcript ("EHT") at 129, 168. Nevertheless, Burleson Country District Attorney Charles Sebesta, who prosecuted Graves, insisted that the State believed from early on that Cookie participated in the killings and that all evidence pointed

to the involvement of three people. Id. at 57, 98. Indeed, the State's theory from the beginning of the trial was that at least three people had acted together in the murders. Id. at 174.[5] Texas Ranger Coffman testified at trial that his investigation showed "at least three and possibly four" perpetrators were in the Davis home when the murders occurred. Trial Transcript ("TT"), vol. 38 at 3728.

Prior to the beginning of Graves' trial, the District Attorney's office had been in negotiations with Carter and his appellate attorney for Carter's testimony against Graves. According to Sebesta, no final agreement on the terms had been reached prior to Carter's arrival in Brazoria County for Graves' trial, although any final plan was to involve the use of a polygraph exam before he testified. Id. at 51. The early discussions also involved Carter's condition that the State would not ask him questions about his wife's role in the murders. Id. at 54.

Sebesta met with Carter in the early evening of October 21, 1994.[6] According to Sebesta, Carter almost immediately claimed, "I did it all myself, Mr. Sebesta. I did it all myself." Id. at 60. When Sebesta stated that he knew that was not true because of the number of weapons used, Carter quickly changed his story and claimed that he committed the murders with Graves and a third man called "Red." Id. at 61, 94, 95. Carter had earlier implicated a person named "Red" during the murder investigation, and the State believed that Theresa Carter may have been known by that

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[5] This theory appears to be based on the number of victims, six, and the number of murder weapons, three (a gun, knife and hammer), not on any specific physical evidence.

[6] This was the evening of the second day of the guilt/innocence phase of the trial.

nickname. Petitioner's Ex. 9 at 24. When Sebesta proposed that "Red" was actually Cookie, Carter denied it and agreed to take a polygraph exam. EHT at 95.

Since the polygraph examiner had been out sick that day, he was called to come in to administer the exam. Id. at 96. The report states that Carter signed a polygraph release statement, had the exam explained to him, and then changed his story once more before the exam was given by stating that he had killed the Davis family with Graves but without "Red." Petitioner's Ex.9 at tab 4. The interviewer then posed the following questions to Carter: (1) "[W]as your wife, Theresa, with you [at the time of the murders]?" and (2) "[W]hen you refer to 'Red' in your statement, are you taking about your wife, Theresa?" Id. Carter answered "no" to both questions. The polygraph examiner concluded that Carter was not being truthful in either response. Id. When the polygraph results were explained to him, Carter once more changed his story. He now admitted that Cookie was involved in the murders with himself and Graves. He also stated that he had invented the character "Red" but later admitted that Cookie was sometimes called "Red." Id. When Sebesta asked him if Theresa had used the hammer in the murders, Carter answered "yes." EHT at 96.

In addition to the tentative deal to forego questions about Cookie in exchange for testifying against Graves, the *338 State had also been working on a broader agreement that would allow Carter to accept a life sentence rather than death if his case were reversed in appeal. This required Carter to testify against both Graves and Cookie. Id. at 67. By the time the October 21 meeting concluded, he had tentatively assented to do so, though no final agreement was reached. Id. at 62, 103, 105. The next morning, however, Carter refused to testify against Cookie and reverted to the initial terms already worked out with the State. Both Carter and Sebesta then accepted the tentative agreement as the final deal for

his testimony.

At the evidentiary hearing, Garvie denied that he knew before, or at any time during, trial that Carter had told Sebesta he killed the Davis family himself. Sebesta testified that he mentioned the statement to Garvie on the morning Carter testified. Id. at 149. The Court accepts Garvie's version of this event based on his credibility as a witness and as being consistent with his vigorous defense of Graves at trial. Sebesta did reveal part of the polygraph results on the morning of October 22 when he told the trial judge: "last night at 8:30 Mr. Carter took a polygraph[,] and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think counsel is certainly entitled to know that." TT, vol. 35 at 3360. Garvie asked no questions about what the polygraph involved. Garvie's co-counsel testified that it did not occur to the defense to inquire into Sebesta's statement because they believed the indictment against Cookie was unfounded. EHT at 134. Nor did it fit the defense's theory of the case. According to Ms. Clay-Jackson, the defense thought that at least two people were involved in the killings but that Cookie was not one of them. Id. at 122. The State then called Carter to the stand and revealed to the jury that he was testifying in exchange for an agreement that questions would not be asked about his wife. TT, vol. 35 at 3429.

Graves' habeas attorneys appear to have first learned of Carter's statement, "I did it all myself," in 1998. On June 19, 1998, Graves' former attorney took a deposition from Carter in which he claimed to have acted alone. Ex parte Graves, No. 40,812-01 at 97 ff. That statement was excluded from the record by the state court as inherently unreliable because Graves' attorney failed to notify the State, as required by law, in order to allow cross-examination. Carter again recanted his trial testimony in a May 18, 2000, deposition attended by both Sebesta and Graves' current counsel.

Sebesta later appeared on the Geraldo Rivera show Deadly Justice on September 3, 2000, and repeated Carter's self-confession. Sebesta stated: "yes, and at that point he [Carter] did tell us, 'Oh, I did it myself. I did it.' He did tell us that." Petitioner's Ex. 1.

The magistrate judge found that Sebesta did not reveal Carter's statement that he committed the murders alone to the defense and that because Graves' attorneys had no way of knowing about the statement, they had no reason to exercise due diligence to discover it. The magistrate also found that this statement was not material because Carter's claim that he acted alone contradicted the evidence and because the jury already had considerable evidence of Carter's multiple inconsistencies and credibility issues.

As to the statement linking Carter's wife Cookie as a direct participant in the crimes, the magistrate found that the defense did not exercise due diligence to discover the statement after Sebesta told *339 them about the polygraph results. He also found that the statement is not exculpatory because it implicated Graves based on the government's three person theory. The statement would also have contradicted the testimony of one of Graves' witnesses who testified that Cookie and Graves were not close and that Cookie was home at the time of the murders.

Considering the effect of the statements together, the magistrate found that the same conclusion would be reached. The three person version of the crime, which implicated Cookie, was most consistent with the State's versions of events and would have reinforced prior statements by Carter also implicating Graves.

The district court considered Graves' objections to the magistrate's report and recommendation, dismissed them all and accepted the magistrate's report, denying Graves' Brady claims. The district court also denied Graves' Motion to Abate, which is not

raised as an issue in this appeal. Graves appeals.

II.

In a federal habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law de novo. *Valdez v. Cockrell*, 274 F.3d 941, 946 (5th Cir.2001). Whether evidence is material under Brady is a mixed question of law and fact. *Summers v. Dretke*, 431 F.3d 861 (5th Cir.2005), citing *Trevino v. Johnson*, 168 F.3d 173, 185 (5th Cir.1999).

Both of Graves' Brady claims were dismissed by the Texas courts as abuses of the writ, i.e. on procedural grounds.[7] Because these claims were not adjudicated on the merits in State court, a prerequisite for the applicability of 28 U.S.C. 2254(d), the heightened standard of review provided by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") does not apply. Id. at 946-47; *Jones v. Jones*, 163 F.3d 285, 299-300 (5th Cir.1998); *Fisher v. Texas*, 169 F.3d 295, 299-300 (5th Cir.1999), citing Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 420-21 & n. 129 (1996)(stating that state court decision that claim was procedurally barred cannot be adjudication on the merits, for purposes of AEDPA).

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[7] In our decisions granting COA, we concluded that Graves had established cause for the procedural default because the state did not disclose the statements until after Graves filed his initial habeas petition. See *Graves I*, 351 F.3d at 154; *Graves II*, 351 F.3d at 158. Graves' petition was remanded to the federal district court for an evidentiary hearing and a decision on the merits of his *Brady* claims, from which Graves now appeals.

III.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Brady applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The Kyles decision emphasizes four aspects of materiality. First, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." 514 U.S. at 434, 115 S.Ct. 1555. The question is not whether the defendant would have received a different verdict with the disclosed evidence, but "whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* A "reasonable probability of a different result" is shown when the suppression "undermines confidence in the outcome of the trial." *Id.*

Second, the materiality test is not a test of the sufficiency of the evidence. The defendant need not demonstrate that after discounting the inculpatory evidence by the undisclosed evidence that there would not have been enough evidence to sustain the conviction. Rather, a Brady violation is established by showing "that the favorable evidence could reasonably be taken to put the

whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S.Ct. 1555. Third, harmless error analysis does not apply. Id. Fourth, "materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." *Id.* at 436, 115 S.Ct. 1555.

Graves bases his Brady claims on two suppressed statements the state admits Carter made on the evening before Carter testified at Graves' trial-- first, that Carter committed the crimes alone, and second, that Carter's wife Cookie was an active participant in the murders.

No one disputes that Carter was the state's star witness. Graves made no self-incriminating statements to the police before his trial. He testified before the grand jury denying all involvement and explaining his whereabouts on the night of the murders. The only potentially incriminating statements allegedly made by Graves were heard over the jailhouse intercom system. The persons reporting these statements were effectively cross-examined on the reliability of the intercom system, their ability to recognize Graves' voice since his cell could not be seen from their listening post, and their failure to make contemporaneous reports of the comments.

The only physical evidence tied to Graves that was marginally linked to the crimes was a switchblade knife brought forward by Graves' former boss that was identical to one that he had given to Graves as a gift. The medical examiner testified that the knife wounds on the victims were consistent with that knife or a knife with a similar blade. Graves' medical expert testified that a wide range of knives with similar dimensions to the switchblade were also consistent with the victims' wounds including holes in skull caps of some of the victims. None of the murder weapons were recovered. Thus, it is obvious from the record that the state relied on Carter's testimony to achieve Graves' conviction. It is in this

context that the materiality of the suppressed statements must be examined.

a. The suppressed statement by Carter that he committed the crimes alone.

The district court found that Graves was not aware of Carter's statement that he committed the crime by himself but found that the statement was not material.[8] Our original assessment of this statement was that it "was extremely favorable to Graves and would have provided powerful ammunition for counsel to use in cross-examining Carter." *Graves I*, 351 F.3d at 155. Although we did not have a completely accurate version of the events surrounding the statement at the time of our original opinion, under the facts as found by the district court on remand we reach the same conclusion.

Carter's statement that he acted alone in committing the murders is particularly significant because it was the first statement Carter made that implicated himself without also implicating Graves. The only other statement Carter made pre-trial exculpating Graves was before the grand jury. In that statement Carter claimed that neither he nor Graves was involved in the murders. At trial the state recognized that its case depended on the credibility of Carter and the prosecutor emphasized Carter's consistency in his various statements in naming Graves as an accomplice. In Carter's grand jury testimony Carter testified that he only gave Graves' name to

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[8] District Attorney Sebesta contradicted Graves' counsel and testified at the habeas hearing that he told Graves' defense counsel Garvie of this statement outside the courtroom the morning after Carter made the statement. The district court did not find Sebesta credible on this point.

investigators because he was coerced.[9] The prosecutor explained Carter's grand jury testimony by pointing out that Carter's testimony, that neither he nor Graves was involved, followed threats by Graves.[10] Carter's suppressed mid-trial statement exculpating Graves was not coerced and would have undercut the state's argument that Carter did not implicate Graves before the grand jury because Graves threatened him. The state's case depended on the jury accepting Carter's testimony. Given the number of inconsistent statements Carter had given, the state faced a difficult job of persuading the jury that Carter was a credible witness, even without the suppressed statement. Had the defense been able to cross-examine Carter on the suppressed statement, this may well have swayed one or more jurors to reject Carter's trial version of the events.

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[9] Before the grand jury, Carter testified as follows:

I couldn't harm anybody, but during interrogation, between seven and eight hours or so, I was told that they got enough evidence on me to give me the death penalty. I know I haven't done anything wrong. I know I wasn't in Somerville like they say I was. They say they know that I didn't do it, but I know who did it and they wanted me to give a name so I tried to tell them that I don't know anybody.

And by being pressured, being hurt, confused and didn't know what to think, I said Anthony Graves off the top of my head.

[10] After eliciting testimony from Carter that Graves had threatened him physically and verbally while they were housed in the Burleson County Jail, the following exchange took place between Sebesta and Carter as Carter testified at Graves' trial:

Sebesta: What did you do when you went to the Burleson County grand jury?

Carter: Lied.

Sebesta: Why did you lie?

Carter: Because I was afraid.

Sebesta: How did you go about lying to them?

Carter: Saying that I made up the whole story, that it didn't take place.

Perhaps even more egregious than District Attorney Sebesta's failure to disclose Carter's most recent statement is his deliberate trial tactic of eliciting testimony from Carter and the chief investigating officer, Ranger Coffman, that the D.A. knew was false and designed affirmatively to lead the jury to believe that Carter made no additional statement tending to exculpate Graves. District Attorney Sebesta asked Carter to confirm that, with the exception of his grand jury testimony where he denied everything, he had always implicated Graves as being with him in committing the murders. Carter answered in the affirmative. Sebesta also asked Ranger Coffman, after Carter testified, to confirm that all of Carter's statements except the grand jury testimony implicated Graves. Sebesta also confirmed through Ranger Coffman that he understood his obligation to bring to the prosecutor's attention any evidence favorable to the defense. Although there is no factual finding regarding whether Ranger Coffman knew of Carter's statement that he committed the crimes alone, Sebesta clearly knew of the statement and used Ranger Coffman as well as Carter to present a picture of Carter's consistency in naming Graves that Sebesta clearly knew was false.

b. The suppressed statement by Carter that Cookie was an active participant in the murders.

The state stipulated that Carter told Sebesta, "Yes, Cookie was there; yes Cookie had the hammer." This statement was also made the night before Carter testified in Graves' trial. Sebesta did not inform Graves' counsel of this statement. He did disclose to the court and counsel that Carter had failed a polygraph regarding Cookie's involvement.[11] The district court found that after hearing

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[11] Sebesta made the following statement: "There is something I need to put on the record from a[sic] exculpatory standpoint. It cannot be used, but last night at 8:30 Mr. Carter took a polygraph and the basic question involved his wife,

about the polygraph, Graves did not exercise due diligence to discover the substance of the statement. The district court also found that the statement was not exculpatory because it did not exculpate Graves. Rather it was consistent with the state's three person theory, that the crime was committed by Carter, Cookie and Graves. We disagree on all points.

Due Diligence?

The district court found that Sebesta's in-court statement "was not so vague in light of the surrounding circumstances that they should not have inquired about it further." However, Sebesta's statement did not reveal or even imply that Carter gave a statement affirmatively naming Cookie as an active participant in the murders. The defense had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime. They had no evidence that Cookie was involved in the crime and viewed her indictment as a tool to get Carter to testify. This assumption was confirmed by Sebesta's discovery response. Sebesta's response to the defense's discovery request was that "there were some names that were given" to the State, but that "[t]hey're not necessarily parties to the crime but they are people who may have--may possibly have some information on those." Sebesta's questioning of Carter at Graves' trial about Cookie's involvement also reinforced defense counsel's belief that she was involved, if at all, after the crimes were committed. In Sebesta's questioning of Carter, Sebesta asked Carter to confirm their agreement that he would not ask any questions about his wife and to confirm that he had "not asked [him] any question about what she may or may not know about it." When the defense

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Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think Counsel is certainly entitled to know that."

cross-examined Carter, they asked about Cookie's whereabouts and who possessed the hammer. Carter's testimony was obviously different than the statement he gave Sebesta the previous night that Cookie was there and Cookie had the hammer.

We disagree with the district court's conclusion that the defense did not exercise due diligence to discover the statement regarding Cookie's involvement in the crimes. Graves' counsel had specifically requested the information disclosed in the statement. We view Sebesta's statement regarding the polygraph, his discovery responses and questioning of Carter as misleading and a deliberate attempt to avoid disclosure of evidence of Cookie's direct involvement. At a minimum, Sebesta's minimal disclosure was insufficient to put the defense on notice to inquire further, particularly in light of the state's discovery disclosure.

Exculpatory?

Graves next challenges the district court's conclusion that the statement regarding Cookie's involvement is not exculpatory because the statement implicated Graves as well.[12] The district court found that the statement is not exculpatory because it implicated Graves based on the government's three person theory. It also found that the statement would have contradicted the testimony of one of Graves' witnesses, Tametra Ray, who testified that Cookie was home at the time of the murders. Again, we disagree.

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12 Graves also argues that the district court erred in concluding that in this suppressed statement, Carter named both Cookie and Graves as participants in the murders. Graves views this suppressed statement as one in which Carter named only his wife Cookie as a participant in the crimes. The district court found that after the polygraph examination Carter admitted that Cookie was involved in the murders with him and Graves. Based on our review of the record of the habeas hearing, that factual finding is not clearly erroneous.

The statement regarding Cookie's direct involvement in the crime is exculpatory for several reasons. First, each party's theory about how many people were actively involved in the crime is just a theory based on the number of people killed and the number of weapons used. The defense had submitted that two people were probably involved and had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime. Although Cookie had been indicted, the defense viewed the indictment as a tool to pressure Carter into testifying. As we noted in our prior opinion, "if Graves had been furnished with Carter's statement, it could have provided him with an argument that those two persons were Carter and his wife rather than Carter and Graves." *Graves II*, 351 F.3d at 159. Also, Carter's statement, placing Cookie directly at the scene and actively involved in the murders, puts his deal with the state to testify only on the condition that he not be questioned about Cookie's involvement in a different light. It provides a stronger argument to Graves that Carter was lying about Graves involvement to save Cookie.

The district court did not reach the issue of materiality of the statement. That issue will be discussed in the following section regarding the effect of the two statements considered together.

c. The statements considered together?

The sole remaining issue under Graves' Brady claim is whether, considered together, the two statements--Carter's claim that he did it himself and Carter's statement directly implicating his wife Cookie in the murders--are material. We conclude that they are. If both statements had been timely furnished to Graves, he could have persuasively argued that (1) the murders were committed by Carter alone or by Carter and Cookie; and (2) Carter's plan from the beginning was to exonerate Cookie, but a story that he *344 acted

alone was not believable, so he implicated Graves so the prosecution would accept his story and decline to prosecute Cookie.

The state argues that the combined statements are not material because they are inconsistent and could have been damaging to Graves if the jury believed that the most credible account of the murders involved three killers, Carter, Cookie and Graves. The problem with the state's argument is that it analyzes the significance of the suppressed evidence against a backdrop of how the defense presented its case at trial without the suppressed statements. If the two statements had been revealed, the defense's approach could have been much different (as set forth above) and probably highly effective.

Case law from the Supreme Court is supportive of a finding of materiality on these facts--particularly because the case against Graves rests almost entirely on Carter's testimony and because the state presented testimony inconsistent with the two suppressed statements. In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court reversed the defendant's judgment of conviction and remanded for a new trial because the prosecutor failed to disclose a promise of leniency to a key witness. The court concluded that the suppression affected the co-conspirator's credibility which was an important issue in the case and therefore material.

In *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court reversed this court's denial of COA to the defendant on his Brady claim. The state withheld evidence that would have allowed defendant to show that two essential prosecution witnesses had been coached by police and prosecutors before they testified and also that they were paid informants. In addition, prosecutors allowed testimony that they were not coached to stand uncorrected at trial. In *Kyles v. Whitley*, 514 U.S. 419, 115

S.Ct. 1555, 131 L.Ed.2d 490 (1995), the defendant's conviction was reversed and remanded for a new trial. The prosecution had suppressed statements of key witnesses and an informant who were not called to testify resulting in a Brady violation because their statements had significant impeachment value. Graves' case presents a cumulation of the elements found violative of a defendant's right to exculpatory evidence in the above cases.

IV.

Because the state suppressed two statements of Carter, its most important witness that were inconsistent with Carter's trial testimony, and then presented false, misleading testimony at trial that was inconsistent with the suppressed facts, we have no trouble concluding that the suppressed statements are material. Carter made several inconsistent statements throughout the investigation and pre-trial period. In some he denied all involvement, in some he implicated himself and Graves, and then, just before he testified against Graves, he gave the statements at issue in this appeal accepting full responsibility as the sole murderer and another statement placing his wife Cookie as an active participant in the murders. If the defense had known about the statement placing Cookie at the scene and given Carter's continuing condition that he would only testify if he were not asked about Cookie's involvement, the defense could have explained every statement implicating Graves as a means of protecting Cookie. As indicated above, these statements are particularly important in this case because Graves' conviction rests almost entirely on Carter's testimony and there is no direct evidence linking him with Carter or with the murder scene other than Carter's testimony. In addition, Carter's statement that he committed the crimes alone is important as the only statement he made exculpating Graves while implicating himself. The combination of these facts leads us to conclude "that the favorable evidence could reasonably be taken to put the whole case in such a

different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. 1555. Stated differently, disclosure of the statements "would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." Id. at 441, 115 S.Ct. 1555.

For the foregoing reasons, the judgment of the District Court is reversed and the case is remanded with instructions to grant the writ of habeas corpus unless the state proceeds to retry petitioner within a reasonable time.

WRIT GRANTED. REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ANTHONY GRAVES	§
	§
	§ CIVIL ACTION NO. G-00-221
	§
DOUG DRETKE,	§
DIRECTOR, TDCJ-CID	§

REPORT AND RECOMMENDATION

Now before the Court are the two remaining issues raised in Petitioner Anthony Graves' Petition for a Writ of Habeas Corpus and Graves' Motion to Abate. On September 6, 202, the District Court denied all of the claims filed by Petitioner, who was convicted of capital murder and sentenced to death in the 23rd District Court of Brazoria County, Texas in November, 1994. The District Court subsequently denied Petitioner a Certificate of Appealability ("COA"), and Graves sought a COA from the United States Court of Appeals for the Fifth Circuit.

On August 15, 2003, the Fifth Circuit granted this request on the sole issue of whether the State violated *Brady v. Maryland*, 373 U.S. 83 (196 3) when it failed to disclose a statement by Robert Carter that Graves was not involved in the murders for which Graves was eventually convicted. *Graves v. Cockrell*, 351 F.3d 143 (5th Cir. 2003). Three months later, the Fifth Circuit issued a second opinion granting a COA on a Brady claim involving Carter's declaration that his wife Theresa (also called "Cookie") committed the murders with himself and Graves. The Fifth Circuit directed the District Court to hold an evidentiary hearing to determine: (1) the

substance of Carter's statements; (2) the degree to which Graves was aware of them or used due diligence to discover them; (3) their materiality under Brady; and (4) whether Graves is entitled to habeas relief on these two claims. *Graves v. Cockrell*, 351 F.3d 156 (5th Cir. 2003).

A two-day evidentiary hearing was held beginning on September 28, 2004, after the District Court referred this case to the Magistrate Judge. Having carefully considered the hearing testimony, Petitioner's post-hearing brief, the state record, and the transcript of Graves' trial, the Court issues its Report and Recommendation to the District Court.

Background

In light of the thorough discussion of this case's background in the Fifth Circuit's initial ruling and in the District Court's Order denying habeas relief, the Court highlights only those facts immediately relevant to its decision. In the early morning hours of August 18, 1992, Bobbie Davis, Nicole Davis, Demitra Davis, Brittany Davis, Lea'Erin Davis, and Jason Davis were murdered in Burleson County, Texas. Bobbie and Nicole both suffered wounds from a knife, a hammer, and a .22 caliber gun. The remaining four children, aged four to nine, were stabbed to death. Robert Carter, the father of four year-old Jason Davis, was soon arrested for his involvement in the killings. He was subsequently convicted in 1994 of capital murder and sentenced to death.

Carter's wife, Cookie, was also indicted for the offense of capital murder. Attorneys Calvin Garvie and Lydia Clay-Jackson, who defended Graves at trial, believed this indictment to be a sham based on false evidence presented to the grand jury and obtained only in order to pressure Carter to testify against Graves. Evidentiary Hearing Transcript ("EHT") at 129,168. Nevertheless,

Burleson County District Attorney Charles Sebesta, who prosecuted Graves, insisted that the State believed from early on that Cookie participated in the killings and that all evidence pointed to the involvement of three people Id. At 57,98. Indeed, the State's theory from the beginning of the trial was that at least three people had acted together in the murders. Id. at 174. Texas Ranger Coffman testified at trial that his investigation showed "at least three and possibly four" perpetrators were in the Davis home when the murders occurred. Trial Transcript ("TT"), vol. 38 at 3728.

Prior to the beginning of Graves' trial, the District Attorney's office had been in negotiations with Carter and his appellate attorney for Carter's testimony against Graves. According to Sebesta, no final agreement on the terms had been reached prior to Carter's arrival in Brazoria County for Graves' trial, although any final plan was to involve the use of a polygraph exam before he testified. Id. At 51. The early discussions also involved Carter's condition that the State would not ask him questions about his wife's role in the murders. Id. At 54.

Sebesta met with Carter in the early evening of October 21, 1994. According to Sebesta, Carter almost immediately claimed, "I did it all myself, Mr. Sebesta. I did it all myself." Id. At 60. When Sebesta stated that he knew that was not true because of the number of weapons used, Carter quickly changed his story and claimed that he committed the murders with Graves and a third man called "Red." Id. At 61, 94, 95. Carter had earlier implicated a person named "Red" during the murder investigation, and the State believed that Theresa Carter may have been known by that nickname. Petitioner's Ex. 9. At 24. When Sebesta proposed that "Red" was actually Cookie, Carter denied it and agreed to take a polygraph exam. EHT at 95.

Since the polygraph examiner had been out sick that day, he

was called to come in to administer the exam. Id. At 96. The report states that Carter signed a polygraph release statement, had the exam explained to him, and then changed his story once more before the exam was given by stating that he had killed the Davis family with Graves but without "Red." Petitioner's Ex. 9 at tab. 4. The interviewer then posed the following questions to Carter: (1) "[W]as your wife, Theresa, with your [at the time of the murders]?" and (2) "[W]hen you refer to "ed in your statement, are you talking about your wife, Theresa?" Id. Carter answered "no" to both questions. The polygraph examiner concluded that Carter was not being truthful in either response. Id. When the polygraph results were explained to him, Carter once more changed his story. He now admitted that Cookie was involved in the murders with himself and Graves. He also stated that he had invented the character "Red" but later admitted that Cookie was sometimes called "Red." Id. When Sebesta asked him if Theresa had used the hammer in the murders, Carter answered "yes". EHT at 96.

In addition to the tentative deal to forego questions about Cookie in exchange for testifying against Graves, the State had also been working on a broader agreement that would allow Carter to accept a life sentence rather than death if his case were reversed on appeal. This required Carter to testify against both Graves and Cookie. Id. At 67. By the time the October 21 meeting concluded, he had tentatively assented to do so, though no final agreement was reached. Id. At 62, 103, 105. The next morning, however, Carter refused to testify against Cookie and reverted to the initial terms already worked out with the State. Both Carter and Sebesta then accepted the tentative agreement as the final deal for his testimony.

At the evidentiary hearing, Garvie denied that he knew before, or at anytime during, trial that Carter had told Sebesta he killed the Davis family himself. Sebesta testified that he mentioned to Garvie on the morning Carter testified. Id. At 149. The Court accepts

Garvie's version of this event based on his credibility as a witness and as being consistent with his vigorous defense of Graves at trial. Sebesta did reveal part of the polygraph results on the morning of October 22 when he told the trial judge: "last night at 8:30 Mr. Carter took a polygraph[,] and the basic question involved his wife, Theresa. It shows deception on that polygraph examination. But, obviously, we can't go into polygraphs here, but I think counsel is certainly entitled to know that." TT, vol. 35 at 3360. Garvie asked no questions about what the polygraph involved. Garvie's co-counsel testified that it did not occur to the defense to inquire into Sebesta's statement because they believed the indictment against Cookie was unfounded. EHT at 134. Nor did it fit the defense's theory of the case. According to Ms. Clay-Jackson, the defense thought that at least two people were involved in the killings but that Cookie was not one of them. Id. At 122. The State then called Carter to the stand and revealed to the jury that he was testifying in exchange for an agreement that questions would not be asked about his wife. TT, vol. 35 at 3429.

Graves' habeas attorney appear to have first learned of Carter's statement, "I did it all myself," in 1998. On June 19, 1998, Graves' former attorney took a deposition from Carter in which he claimed to have acted alone. *Ex parte Graves*, No. 40,812-01 at 97ff. That statement was excluded from the record by the state curt as inherently unreliable because Graves' attorney failed to notify the State, as required by law, in order to allow cross-examination. Carter agin recanted his trial testimony in a May 18, 2000, deposition attended by both Sebesta and Graves' current counsel. Sebesta later appeared on the Geraldo Rivera show Deadly Justice on September 3, 2000, and repeated Carter's self-confession. Sebesta stated: "yes, and at that point he [Carter] did tell us, 'Oh, I did it myself. I did it.' He did tell us that." Petitioner's Ex. 1.

Standard of Review

The due process rights of the Fourteenth Amendment prohibit a prosecutor from suppressing evidence that is favorable to a defendant under certain conditions. *Brady*, 373 U.S. at 87-88. However, the exclusion of favorable evidence does not in itself automatically entitle a petitioner to habeas relief. In order to establish a *Brady* violation, Graves must demonstrate that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; (3) it was material either to guilt or punishment; and (4) nondiscovery of the evidence did not result from a lack of due diligence. *Rector v. Johnson*, 120 F.3d 551,558 (5th Cir. 1997). Evidence is material only if there is a "reasonable probability" that the result of the proceeding would have been different if the

evidence has been disclosed. *United States v. Bagley*, 473 U.S., 667, 682 (1985); *Jackson v. Johnson*, 194 F.3d 641, 649 (5th Cir. 1999). Reasonable probability is defined as a probability "sufficient to undermine confidence in the outcome of the trial." *United States v. Nixon*, 881 F.2d 1305, 1308 (5th Cir. 1989). However, the *Brady* standard is not a result-oriented test of the sufficiency of the evidence produced at trial. *Spence v. Johnson*, 80 F.3d 989, 994 (5th Cir. 1996).

Suppressed evidence that is cumulative to other evidence, or that has only incremental impeachment value, does not meet the materiality standard. *Drew v. Collins*, 964 F.2d 411, 419-20 (5th Cir. 1992). A court must examine the combined effect of the evidence that was withheld and not look at each piece of suppressed information only in isolation. *Kyles v. Whitley*, 514 U.S. 433, 436 (1995). In doing so it must assess the evidence "in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt." *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000).

The Court stresses this legal standard because Graves' attorneys claim that Petitioner need only show that the trial result *could* have been changed had the statements at issue been disclosed. Petitioner's Brief at 4. Petitioner would be correct if his claim were perjury-related, *Barrientes v. Johnson*, 221 F.3d 741, 756 (5th Cir. 2000), but Petitioner has only complained of non-disclosure. In *Kyles, supra,* the Supreme Court observed that harmless error analysis is applicable to a *Brady/Giglio* claim arising in a habeas case outside the perjury-related context.[13] In such a case, *Brady* demands more than the mere possibility, or even the likelihood, the outcome could have been different. While similar to the materiality standard of *Giglio v. United States*, 405 U.S. 150 (1972), which prohibits the intentional use of false evidence, *Brady's* relevant materiality requirement is a more stringent standard than *Giglio's* test that there be a "reasonable likelihood" that the outcome would have been different. *Barrientes*, 221 F.3d at 756. Instead, it is identical to the more demanding prejudice requirement for showing ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688, 694 (1984). *Martin v. Cain*, 246 F.3d 471, 477 (5th Cir. 2001).

Discussion

Carter's Own Admission

This Court finds that Sebesta did not reveal Carter's statement that he committed the murders himself. The Court can only hope that the reason for his nondisclosure was the prosecutor did not believe it was credible. EHT at 72. Regardless, Sebesta's personal

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13 Petitioner has not complained of Carter's perjured testimony during redirect examination that every story he had told except his grand jury testimony had implicated Graves. TT, vol. 35 at 3456-57. The Court, therefore, does not address any claim that Petitioner's conviction was obtained by the knowing use of perjured testimony.

belief about the truth of Carter's statement was irrelevant. The comment was exculpatory on its face, and even acting in good faith did not relieve Sebesta of his *Brady* obligations. *Rector*, 120 F.3d at 558. Since Graves' attorneys had no way of knowing what Carter had said and were given no indication that relevant information was available, they had no reason to exercise due diligence to discover it.

The only issue, then, is whether or not Carter's statement is material. Petitioner claims that the statement's timing makes it material. He appears to argue that Sebesta only proposed the testimonial agreement in the October 21 meeting after Carter failed the polygraph exam. According to this account, failing the exam changed the dynamics of the negotiations in that Sebesta pressured Carter to testify against his wife in a police "interrogation." Petitioner's Brief at 8-9. It was only the deal to protect Cookie, Petitioner alleges, that induced Carter's testimony against Graves, and Carter would otherwise have testified that Graves was innocent. Id. at 9. This echoes one of the principal concerns expressed by the Fifth Circuit, which had allegations before it that Carter only changed his testimony to implicate Graves as a result of the State's agreement.

Petitioner's version of events is incomplete. The evidentiary hearing showed that Carter did not change his story from "I did it all myself" to one that implicated Graves in order to strike a deal with the State. Discussions concerning Carter's testimony against Graves had been ongoing for several months before the trial began. Sebesta, an assistant district attorney, Coffman, and Carter's appellate attorney visited him in prison twice in the summer of 1994 to discuss the terms of Carter's testimony. EHT at 50-51. On September 8, 1994, almost six weeks before Carter testified, Sebesta told the trial judge and Graves' attorneys that a tentative agreement had been worked out for Carter to testify against Graves

in exchange for not being asked questions about Cookie. TT, vol. 8 at 3-4. Although Sebesta stated at the hearing that no final agreement had been reached at that time, EHT at 51, the trial record shows these were the conditions initially agreed to by Carter and the State.

There is no evidence that the terms of the initial agreement were in question, or that Carter had no reason to believe they were, when he spontaneously told Sebesta at the beginning of their meeting that he had acted alone. Sebesta testified that this remark did not change the prosecution's position on the deal, and nothing suggests Carter thought otherwise. EHT at 60. Petitioner's repeated suggestion that Carter backed down from his exculpatory statement in response to some pressure by the State to prosecute Cookie, or in an effort to resurrect the terms of the tentative agreement, is simply unfounded. The agreement had been worked out over a period of time and was fully available to Carter both before and after he made the statement at issue here.

The evidence shows that Carter freely recanted his "I did it all myself" statement when Sebesta pointed to the evidence that showed that more than one person must have been involved. He also freely, and quite quickly, reimplicated Graves together with "Red." EHT at 61, 94-95. Contrary to Petitioner's version, this recantation occurred before the polygraph was administered. After failing the polygraph, Carter again implicated Graves, this time with Cookie. While Carter may have been motivated to testify against Graves in the first place in order to protect Cookie, this was well known to his attorneys by the time Carter testified and was fully revealed to the jury. Graves' attorneys had ample opportunity to attack Carter's motives at trial, and the jury was able to assess his credibility in light of the deal's term.

The defense relied primarily on two things at trial: alibi

testimony and impeachment of Carter's credibility. Ms. Clay-Jackson testified that disclosure of Carter's statement would not have affected the alibi evidence, the most important part of which the state court found "the jury obviously did not believe." *Ex parte Graves*, No. 73,424 at 12. Therefore, the strongest benefit of Carter's statement to the defense lies in its impeachment value. This could rest on at least two grounds: (1) Carter's trial testimony against Graves could have been attacked as unreliable on the theory that the self-confession was a more credible version of events, or (2) it could have been attacked as unreliable because, in light of the exculpatory statement, there were simply too many stories to make any of them credible.

Petitioner claims that if Sebesta had revealed the exculpatory statement, Carter would have testified that he acted alone and that his testimony would have been inherently believable to the jury. Ms. Clay-Jackson confirmed this by stating that the defense could have counted on the statement's reliability and taken Carter through the murders step by step on this basis. EHT at 131. But even assuming that grand assumption, Petitioner has not shown that his statement would have had such an effect on the jury that it undermines confidence in the trial's outcome. The exculpatory statement fitted neither the State's three-person theory (which the jury heard) nor the defense's belief that at least two people were involved. Both trial attorneys testified that the number of victims and weapons used made it reasonable to conclude that more than one person was involved. Id. at 125, 162. It is difficult to see why there is a reasonably probability a jury would have believed Carter acted alone when Graves' own counsel admit it was reasonable to find otherwise. Obviously, Carter's testimony that he and Graves did the deeds themselves does not fully match the three-person theory, but the jury also knew that Carter was protecting Cookie. Nevertheless, Petitioner argues that the jury would have credited the October 21 exculpatory statement over pre-trial claims

implicating Graves because Carter made those earlier statements in an attempt to avoid prosecution. Petitioner's Brief at 9. The facts show this cannot be true. Carter went to trial in January/February of 1994. TT, vol. 38 at 3691. He had already been convicted and condemned to death when he confessed to Coffman on October 2, 1994 and when he reached an initial agreement to testify against Graves. There is no evidence the State ever agreed to drop the death penalty in exchange for Carter's testimony against Graves alone. Carter's self-confession was not the persuasive evidence Petitioner claims.

Petitioner insists that Carter's May, 2000 deposition, which recanted his trial testimony, must be considered here. Petitioner's Brief at 18. Presumably, Petitioner is claiming that Carter would have given cross-examination testimony identical to the 2000 statement and that this new version of events would have been credible to the jury. This is a difficult argument to make. The materiality of *Brady* evidence depends "on the value of the evidence relative to the other evidence mustered by the State." *Smith v. Black*, 904 F.2d 950, 967 (5th Cir. 1990). The 2000 deposition was not part of anyone's trial evidence and is not properly part of the materiality analysis. Even if it were and Carter had given the same testimony at trial, Petitioner overlooks the fact that Carter's statement contradicts the medical evidence. In the 2000 statement, he alleged he made an "attempt to hit [Nicole Davis] in the head with the hammer but she woke up and that's when I had to use a gun." Deposition at 34-35, 37. In neither the 1998 nor the 2000 depositions did Carter recall using a knife on Nicole or actually hitting her with the hammer. *See Ex parte Graves*, No. 40,812-01 at 112. In reality, Nicole suffered three knife wounds to the face and abdomen, three hammer blows to the head, and five gunshot wounds. Recantation testimony is viewed with extreme skepticism under federal and state law. *United States v. Adi*, 759 F.2d 404, 407 (5th Cir. 1985); *Chavez v. State*, 6 S.W.3d 56, 62 (Tex.Crim.App.

1999). It must therefore be elicited with great care. Graves' attorneys, who took the deposition and had the benefit of seeing the inadmissible 1998 statement, should have, if possible, accounted for these discrepancies while interviewing Carter. Given that his statement matches neither the medical evidence nor Coffman's undisputed testimony that at least three people were involved, Petitioner has not demonstrated materiality.

Graves further argues that the exculpatory statement had potential value to the defense because Carter had earlier exonerated him before the grand jury. Garvie testified that he would have considered the statement important because it could have confirmed that Carter's grand jury testimony was accurate. EHT at 150. This overlooks the fact that the October 21 claim contradicted Carter's grand jury testimony that he himself was also innocent. It also ignores the fact that Carter gave the trial jury grounds to dismiss the credibility of his grand jury testimony. He stated that he had lied before the grand jury and had done so because Graves threatened him while they were housed in the Burleson County jail. TT, vol. 35 at 3431, 3437. The State presented independent evidence of threatening statements by Graves to Carter while they were in jail such as "Yeah, motherfucker, I did it, keep your mouth shut" and "Keep your damn mouth shut. I done the job for you. Make them make their own damn case." Id. At 3864, 3879. These comments were made on August 25, 1992, the day before Carter's grand jury testimony and could have been construed by the jury to confirm Carter's account of why he exonerated Graves the next day. The jury clearly credited his trial testimony over the grand jury statements because it found Graves guilty. It is a difficult leap to say that the October 21 confession would have affected the jury so much that it would have disregarded Carter's explanation as to why he lied to the grand jury. The difficulty is heightened by the fact that the October 21 statement was inconsistent with every other version of events Carter had given, including the grand jury

testimony itself.

Both of Petitioner's trial attorney's stated that the exculpatory statement could also have been used to impeach Carter's credibility as a witness. Unfortunately, Graves' habeas attorneys do not address this issue. Nevertheless, the impeachment value depends on placing the comment in the context in which it occurred. The jury learned that Carter had given at least three different versions of who participated in the murders before he testified at trial. A transcript of an investigative interview between Carter and Ranger Coffman that took place shortly after the murders was read at trial in which Carter denied his own involvement and accused Graves. TT, vol. 37 at 3585ff. Grand jury testimony was read into the record in which Carter recanted his previous statements to Coffman and swore under oath that neither he nor Graves had been involved. Id. at 3618ff. A third transcript of an October, 1994 conversation between Coffman and Carter taken after his conviction was also read in which Carter stated that he and Graves acted together with "Red." Id., vol. 38 at 3693ff. A complete inventory of all Carter's versions by the close of trial includes the following:

1. Graves did it alone (1992 statement to Coffman);
2. Neither Carter nor Graves did it (1992 grand jury testimony);
3. Carter did it with Graves (1994 pre-trial negotiation statements);
4. Carter did it with Graves and "Red" (October 2, 1994 statement to Coffman);
5. Carter did it alone (October 21, 1994 statement to Sebesta);
6. Carter did it with Graves and "Red"(id.);
7. Carter did it with Graves (pre-polygraph statement of October 21, 1994);

8. Carter did it with Graves and Cookie (post-polygraph statement to Sebesta);
9. Carter did it with Graves (trial testimony).

The jury heard versions 1, 2, 4, and 9 and heard Carter admit that he had given a different, though unspecified, account at his own trial. Id., vol. 35 at 3453. It also heard multiple attacks on Carter's credibility from the defense and admissions from Carter himself. In the grand jury transcript, he stated that he had lied to Coffman in the investigation. Carter then said he had given false testimony before the grand jury. Id. At 3431, 3437. He admitted that he might lie to avoid the death penalty. Id. At 3454. Even State witness Coffman admitted Carter had lied "a lot." Id., vol. 38 at 3775.

Although it is certainly possible that one more version might have led the jury to reach a different conclusion, it is clear that the jury overcame serious questions about Carter's credibility as a witness in order to find Graves guilty. Carter told the jury he had previously given four to five different accounts and that his current testimony differed from the story at his own trial. Id., vol. 35 at 3440. The jury also knew the terms of Cater's agreement with the State and the motive that might have given him for testifying against Graves in order to protect his wife. The defense had versions 1, 2, and 4 listed above, plus the unspecified version at Carter's own trial, to impeach the credibility of number nine. In light of the fact that Carter's claim to have acted alone contradicted the evidence, and the fact that the jury already had considerable evidence before it of Carter's multiple inconsistencies and credibility issues, the Court cannot find that it is reasonably probable that disclosing that statement would have led to a different outcome.

Under these facts, Carter's self-confession could be material to Graves' defense only if it is considered in combination with

Carter's other claim that he killed the Davis family with Graves and Cookie. For the reasons stated below, the combined effect of the two statements does not lead to a different conclusion.

Carter's Second Admission

Petitioner argues that the materiality of the statement implicating Cookie has already been decided by the Fifth Circuit because the remand orders establish the law of the case on this point. Petitioner's Brief at 6. This cannot be true since one of the purposes of remand was for the District Court to determine materiality. However, the second remand order raises a more serious law of the case issue. The Fifth Circuit remarked that although Cookie had been indicted, "the state's position was that she was involved after the fact." *Graves*, 351 F.3d at 158. Insofar as this important statement falls within the law of the case doctrine, its reexamination would ordinarily be barred at this point. *Alpha/Omega Ins. Services, Inc. V. Prudential Ins. Co. Of America,* 272 F.3d 276, 279 (5th Cir. 2001).

That doctrine, however, is subject to exceptions, including when evidence produced in a subsequent trial or hearing is substantially different from the finding in question. *Lyons v. Fisher*, 888 F.2d 1071, 1075 (5th Cir. 1998). In the hearing, Sebesta specifically rebutted the conclusion that the State only suspected Cookie was an after-the-fact accomplice. When asked if the State's theory was that Cookie was "actively a participant" in the murders, he responded: "It was our theory that were [sic] was an active participant and from very early on because she was indicted . . .at the very same time that Carter and Graves were indicted." EHT at 57. It is clear that by "active participant" Sebesta meant that Cookie directly took part in the killings as Carter admitted on October 21 because the same phrase was immediately used in the hearing to describe what Carter had actually said. Id. Sebesta also testified that Carter's statement that he had committed the crimes

with Graves and Cookie was "absolutely" consistent with the State's theory. Id. at 98.

Sebesta's testimony also matches other aspects of this case. As outlined above, the State consistently presented a theory to the jury that at least three persons were actively involved in the murders. TT, vol. 38 at 3728. Sebesta repeated Ranger Coffman's testimony on this point in his closing arguments. Id. Vol. 42 at 4202-03. Even Petitioner himself specifically claimed in the federal habeas petition that the State believed Cookie "was one of the participants actively involved in these killings, and they had indicted her as such "and that her active involvement "is an undisputed fact." Habeas Petition at 141. The Court therefore finds that the law of the case doctrine does not forbid the conclusion that the State believed Cookie was an active participant in the Davis murders.

Unfortunately, Graves' habeas attorneys fail to address one of the key *Brady* points posed by the Fifth Circuit: whether the nondiscovery of Carter's statement about Cookie resulted from a lack of diligence. After reviewing the records in this case, the Court finds that even though Graves' trial attorneys otherwise ably defended him, Sebesta's in-court statement was not so vague in light of the surrounding circumstances that they should not have inquired into it further. Both trial attorneys stated that it did not occur to them that Cookie was involved because her daughter Tremetra Ray, was prepared to testify that Cookie was at home when the murders took place. EHT, 112, 122. The defense attorneys should have known what Ray was prepared to tell the jury and that her version of events was a weak basis for this conclusion. Ray actually testified that Carter and her mother were at home together on the night of the murders. TT, vol. 41 at 4135. In light of the fact that Carter had already been convicted and was, in fact, about to admit his guilt at Graves' trial, Ray's testimony could not have been compelling reason to ignore Sebesta's in-court revelation. Cookie's 1992 indictment, the terms of Carter's

testimony agreement, and the weakness of Ray's alibi testimony should have alerted the defense attorneys to look more closely at Sebesta's on-record statement that Carter had lied about Cookie. The fact that her active participation would disrupt the defense's version of events was not sufficient reason for remaining silent when the defense learned that the key witness against their client may have made false statements about his wife's involvement. Regardless of the defense's theory, due diligence, if not simple curiosity, should have prompted some inquiry during the hearing.

Even if due diligence were not an issue, Carter's statement is not exculpatory. Both of Graves trial attorneys admitted it was not exculpatory on its face, and it is easy to see why: the statement directly implicates Graves himself. EHT at 117, 158. Nevertheless, Petitioner argues that Carter's statements was material and exculpatory because the State believed "at least two persons" committed the murders. He claims evidence that Cookie was one of the killers would have significantly weakened the argument that Graves was also involved because it accounted for the two-person scenario without him. Petitioner's Brief at 14-15. Petitioner's argument works only if "at least two persons" is construed to mean that "only two persons" were responsible for the Davis murders. Had the prosecution believed that only two people were involved, then Carter's statement would have been material because it could have deflected suspicion away from Graves as the second killer. But the State never presented such a theory to the jury. It consistently believed that at least *three* persons were involved and presented its case accordingly. EHT at 98. Carter's statement implicating Graves and Cookie fit that theory and would not have been exculpatory on the basis Petitioner argues. Garvie confirmed this at the hearing by admitting that any implication of Petitioner and cookie together would not have helped the defense. EHT at 173. The fact that Carter's statement matched up with the State's three-person theory could even have lent it credibility, which would

have been damaging to Petitioner.

The statement could also have harmed Petitioner's attack on the State's motive theory. The State believed that Graves was motivated, in part, by his close relationship with Cookie, who was his cousin. The defense used Tremetra Ray to show that the two cousins were not close at all. As stated above, however, Ray's testimony contained the central claim that Cookie and Carter were at home together when the murders occurred. Carter's confession that Cookie was involved would have directly contradicted this and could have led the jury to question Ray's credibility as a defense witness even more than it did.

Much of Petitioner's argument implies that he was unable to raise questions in the jury's mind about Cookie because Carter's statement was not disclosed. This overlooks the nature of the testimonial agreement itself. Obviously, the State could not limit the defense's ability to cross-examine Carter about Cookie if they so desired. The agreement only limited the State's right to do so. Graves' attorneys knew the State had indicted Cookie; that it was arguing a three-person theory; that Carter was very eager to protect Cookie; and that he had agreed to testify against Graves only in exchange for not being asked questions about her by the State. The defense therefore had the freedom and the opportunity to cross-examine Carter about his wife's involvement.

The *Brady* evidence at issue here must also be examined to assess the combined effect if both statements had been disclosed. Although Petitioner's attorneys provide no argument on this issue, the disclosure of both of Carter's statements does not lead to a different conclusion. In fact, the combined effect could well have been damaging to Petitioner. The jury could not have believed both of Carter's contradictory claims. If they had been disclosed, this could have undermined any credibility the jury might otherwise

have given to Carter's allegation that he acted alone. Unlike that claim, the statement implicating Cookie and Graves identified the missing third person the State had argued was involved. Given that the defense itself did not believe one person committed the murders, it is very unlikely the jury would have believed Carter's one-person version when it also had his three-person story that matched the evidence. The jury could also have taken Carter's three-person statement as more credible because it was strongly against his well-known desire to protect Cookie. Moreover, if both statements had been raised on cross-examination, the State would presumably have been able to point to Carter's two additional October 21 versions that implicated Graves (numbers 6 and 7 above). This would have reinforced the consistency with which Carter had implicated Graves because, other than the exculpatory statement and the discredited grand jury testimony, all of Carter's accounts listed above named him as a participant in the murders. Carter's undisclosed statements do not meet the materiality standard when considered alone or in combination, and Petitioner has not shown a *Brady* violation in this case.

The Motion to Abate

Following the completion of the evidentiary hearing Graves filed a Motion to Abate. He asks the Court to abate the federal habeas proceedings so that he may return to state court to pursue and additional *Brady* claim based on a newly-discovered transcript of Cookie Carter's 1992 grand jury testimony. Texas courts allow successive petitions only under narrowly-defined circumstances. Tex. Code. Crim. Proc. Art. 11.071 § 5. This Court expresses no opinion as to whether Petitioner could meet those requirements on the new claim. However, Petitioner cannot pursue a new claim in state court while the federal proceeding is ongoing. The federal case must either first be resolved or abated. *Ex parte Soffar*, 143 S.W.3d 804 (Tex. Crim. App. 2004)

Although *Soffar* empowers state courts to hear successive issues if the previously-filed federal proceeding is abated, it has no effect on a federal court's jurisdiction over the case before it. State remedies for the two *Brady* issues at stake here have been exhausted, and the fact that Petitioner's attorneys believe they have recently discovered a third *Brady* claim has no direct bearing on this case. The new claim is factually distinct from the two under consideration. The discovery required to save the new claim from Texas' abuse of the writ doctrine is entirely separate from the evidentiary background of the instant issues. Petitioner does not allege that his ability to pursue his new claim in state court at a later point will be harmed if the federal case continues. By contrast, abating this proceeding would certainly delay the resolution of the two remanded *Brady* claims, which have been in litigation in federal court for over four years.

In support of this motion, Petitioner's attorneys have submitted supplemental briefing in which they argue that Cookie's grand jury testimony must be considered in combination with the *Brady* material discussed above. Petitioner argues that Cookies's testimony could have led defense counsel to suspect that she was the second party in their two-person murder scenario. Even assuming for the sake of argument that the unverified transcript is part of the record and should be considered in this context, the claim is unavailing. Cookie told the grand jury two relevant things: (1) Carter was innocent because he was at home with here when the murders occurred, and (2) Carter told here he wrongfully implicated Graves during the murder investigation because the Texas Rangers pressured him. In light of Carter's admission of guilt at Graves' trial, the first statement appears to be simply untrue. The second comment is cumulative evidence because Carter told the grand jury the same thing. The defense had access to that testimony. If the defense chose to ignore the State's indictment and not believe Cookie was involved, it was certainly not because her grand jury

testimony was suppressed. Although Petitioner has not exhausted his state remedies on this claim, the District Court may deny a habeas claim on the merits notwithstanding a petitioner's failure to satisfy the exhaustion requirement. 28 U.S.C. § 2254(b)(2).

CONCLUSION

For all the reasons stated above, the Court **RECOMMENDS** that Petitioner's Motion to Abate (Instrument No. 102) be **DENIED** and that the two *Brady* issues on remand from the Fifth Circuit also be **DENIED.**

This Clerk shall send copies of this Report and Recommendation to the Petitioner by the means in place for transmission of same. Petitioner shall have until November 22, 2004 in which to have written objections, filed pursuant to 28 U.S.C. § 636(b)(1)©), physically on file in the Office of the Clerk. The Objections shall be mailed to the Clerk's Office in Galveston, Texas 77553 at P.O. Drawer 2300. Any objections filed shall be contained in a written document specifically entitled "Objections to the Report and Recommendation of the Magistrate Judge", which will then be forwarded to the District Judge for consideration. Failure to file written objections within the prescribed time shall bar the aggrieved party from attacking on appeal the factual findings and legal conclusions accepted by the District Judge, except upon grounds of plain error.

DONE at Galveston, Texas this 8th day of November, 2004.

JOHN R FROESCHNER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ANTHONY GRAVES	§	
	§	
	§	CIVIL ACTION NO. G-00-221
	§	
DOUG DRETKE,	§	
DIRECTOR, TDCJ-CID	§	

ORDER AND OPINION

Before the Court is the Magistrate Judge's Report and Recommendation concerning two issues under *Brady v. Maryland*, 373 U.S. 83 (1963) remanded to the Court by the Fifth Circuit. After holding an evidentiary hearing, the Magistrate Judge recommends that both of Petitioner's *Brady* claims be denied. Petitioner has filed his Objections after being given an extension of time to do so.

Petitioner first objects to several general aspects of the Report. He complains that the Magistrate Judge used the wrong legal standard to analyze the claims at hand and argues that he has raised various perjury claims related to Robert Carter's testimony. Objections at 2-7. This claim is without merit. In its original Order, this Court showed that Petitioner had raised separate claims regarding the State's non-disclosure of Carter's October 21 statements and the State's failure to correct Carter's allegedly perjured testimony to the jury. *See* Order at 23-29. Petitioner himself confirms this by pointing to Claims 4 and 5 in the Petition, which state separate claims under *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972). The Court denied both the *Brady* and perjury allegations as separate issues, and the Fifth Circuit

remanded this case only on the two *Brady* claims. *Graves v. Cockrell,* 351 F.3d 143 (5th Cir. 2003); *Graves v. Cockrell*, 351 F.3d 156 (5th Cir. 2003). Petitioner's reliance on *Giglio*'s materiality standard is therefore misplaced. Objections at 82.

Likewise, Petitioner's Objection to the burden of proof stated in the Report is incorrect. The Report does not allege Petitioner was required to show the trial's outcome would have been different or that it was more likely than not it would have been different. It states he must show there is a "reasonable probability" the result would have changed, understood as a probability sufficient to undermine confidence in the outcome of the trial. *See Martin v. Cain,* 246 F.3d 471, 477 (5th Cir. 2001); Report at 5-6, 13. Likewise, this Court has used the standard articulated in *Kyles v. Whitley,* 514 U.S. 433, 436 (1995), on which Petitioner relies, in its *de novo* review of this case. *Kyles* stresses that the key issue in a *Brady* analysis is whether, in the absence of the undisclosed information, the defendant received a fair trial whose outcome is worthy of confidence. *Id.* at 434.

Before addressing specific Objections, the Court notes several things. first, Petitioner frequently supports his arguments by stating that he has presented "substantial claims of *actual innocence.*" *See, e.g.*, Objections at 75 (emphasis in original). However, Petitioner's actual innocence claim was rejected by this Court and the Fifth Circuit and is no longer at issue in these proceedings. Although claims of actual innocence can serve as a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits." *Dowthitt v. Johnson,* 230 F.3d 733, 742 (5th Cir. 2000), the *Brady* issues are not barred, and Petitioner's claim is not so argued.

Second, Petitioner complains that the Report "relies" on Carter's May 18, 2000 deposition to deny his *Brady* claims and that

he has "absolutely no idea" what document certain portions of the Report refer to when discussing the deposition. Objections at 45-46. Neither the Magistrate Judge nor this Court has relied on the deposition in this manner. It is Petitioner himself who urges consideration of the deposition in his materiality brief. Petitioner's claim that he is unable to discern what document the Report refers to in this regard is groundless; the Report specifically cites the precise pages of the 2000 deposition that are discussed.

Third, Petitioner's claim that the Magistrate Judge decided the credibility of witnesses who did not appear before him at the evidentiary hearing is unwarranted. In reality, Petitioner himself made such an argument by stating that, had Carter testified he acted alone, it would have been inherently credible to the jury. The Report merely explores the possible impeachment value of the *Brady* material at issue here by examining it in light of the evidence produced at trial. "[A] *Brady* violating is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt" *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000). Finally, Petitioner complains that the Report misapplies the law of the case doctrine. However, Petitioner fails to address the exceptions to that doctrine noted in the Report or to state any reason why they should not apply in this case.

Petitioner objects to many specific findings in the Report. The Court has carefully reviewed his claims, which contain only three separate citations to the trial record, and finds they show no error in the Report. Insofar as Petitioner complains that the Report misstates his position, the Court finds that the Report fairly characterizes his statements in the materiality brief. Any discrepancies between what is stated in the Report and what Petitioner intended in the brief have been noted by the Court.

More importantly, Petitioner alleges the Magistrate Judge erred

in accepting Sebesta's testimony in the hearing. Petitioner complains that he could not rebut such testimony because certain evidence had not been in his possession for several years, but he fails to identify any evidence that was not available to him by the time of the hearing. Petitioner had ample freedom to cross-exam Sebesta on all points, and he fails to show any reason why uncontroverted testimony should not be deemed credible.

In discussing the first *Brady* issue - Carter's statement I did it all myself" - Petitioner does not dispute the Report's finding that Carter gave nine different versions of events by the close of trial, nor does he address the Report's analysis of the exculpatory statement's impeachment value. Petitioner also misstates the legal requirement for materiality. He claims that because the Report found that it was "possible" Carter's statement could have led to a different result, materiality has been shown. This overlooks the established case law governing *Brad y* materiality standard.

In relation to Carter's statement implicating his wife, Petitioner argues for the first time that his trial attorneys used due diligence to discover the exculpatory statement. For the reasons stated in the Report, the Court finds that they did not. Petitioner's attorneys stated that they did not inquire into Sebesta's in-court statement that Carter had lied about his wife's involvement because Ms. Ray had told them that Cookie was at home at the time the murders took place. Evidentiary Transcript ("ET") at 112, 122. Petitioner complains that this is insufficient because Ray did not testify at trial as an alibi witness. The nature of Ray's testimony is not at issue. Ray stated that she went to bed at midnight, woke up around 3:00 a.m. and saw Carter and her mother together in the house. By all accounts, the murders had already taken place by 3:00 a.m. If Petitioner's attorneys relied on Ray's statement because it allegedly showed Cookie was at home during the specific time the murders occurred, their reliance was unreasonable because ray was asleep at

that time. If their reliance was based on testimony that Carter and Cookie were at home at the same time, it was misplaced because Carter had already been convicted. The fact that Cookie was seen with Carter at 3:00 a.m. was no basis for believing her to be uninvolved with the killings.

The Report distinguishes between the Petitioner's trial theory that "at least two persons" were involved in the murders and the State's theory that three persons acted together. Petitioner complains that the State's theory that three persons acted together. Petitioner complains that the State, in fact, had a theory that two individuals killed the Davis family. Objections at 66. The Court's examination of the record finds no evidence to support this claim, and Petitioner again makes no reference to any portion of the trial record. The State's theory was always that three people were involved, and Sebesta reasserted the point in his closing statements.

Petitioner further states that the three-person theory does not render Carter's statement about Cookie non-exculpatory, and that the defense's theory was not inconsistent with the State's. By definition, of course, three people include "at least two person." However, Petitioner's argument in his materiality brief is exactly what the Report states: suppression of evidence that Cookie was the second suspect enhanced the credibility that Petitioner was the second suspect. According to Petitioner, "[b]y Carter's exculpatory admission, he accounted for the identify of *both* of the possible suspects, i.e. himself and his wife." Brief at 14 (emphasis in original). Although it is undisputed three people had been indicted, Petitioner here assumes that only two people were under active suspicion and that identifying the second suspect as Cookie makes Carter's statement about her exculpatory in regard to himself.

Had Sebesta revealed the statement about Cookie, however, it would have implicated *three* persons, not two. It would have

directly re-implicated Petitioner and would have confirmed the State's three-person scenario. As the Report notes, Petitioner's own trial counsel admitted that Carter's claim that he killed the Davis family with Petitioner and Cookie would not have been helpful to Petitioner's defense; only a claim that Carter and Cookie acted together without Petitioner would have served. ET at 173. No evidence shows that Carter ever made such a claim.

Petitioner complains that the polygraph report, which contrary to his claim was specifically referred to in the Report, did not implicate him. The issue at stake here is not what the report itself states but what Carter told Sebesta. Before the exam was administered, Carter claimed to Sebesta that he had committed the murders with Petitioner and a third person called "Red" was, in fact, Cookie; it was not designed to question the issue of Petitioner's involvement. As Sebesta testified, "[i]t was a given the whole evening [Petitioner] was involved." ET at 95. When Carter admitted that Cookie was "Red," this did not exonerate Petitioner, as he appears to claim, because the context of the exam was clearly one that assumed Petitioner's involvement. Sebesta unambiguously testified Carter never stated he acted only with Cookie and that Petitioner's involvement was never in doubt. Id. at 96.

Petitioner objects to the Report's finding that the combined evidence of the statements in question does not violate *Brady*. The Court's review of the trial record leads it to the same conclusion as the Magistrate Judge. Petitioner argues somewhat obscurely in this regard that Carter was "broken down" by the State on October 21, an allegation that occurs throughout his Objections. Objections at 70. The Court agrees with the Magistrate Judge's finding that the record does not support this conclusion. The evidence set forth in the Report shows that the deal finally struck between Carter and the State was not the trigger for obtaining his testimony against Petitioner in the manner that he argues or that Carter would

otherwise have testified to Petitioner's innocence.

Finally, Petitioner claims he is entitled to an abatement of his federal case. Petitioner claims he would be harmed if abatement is denied, but he provides no relevant argument and does not contest the Report's finding that the discovery process involved in his subsequent state claims are separate from those at issue here. Likewise, Petitioner has not shown that the instant case cannot be decided without abatement.

Having given this matter *de novo* review under 28 U.S.C. § 636(b)(1)©), this Court finds that nothing in Petitioner's Objections controvert the Magistrate Judge's findings. Therefore, the Report and Recommendation should be, and is hereby, **ACCEPTED**.

Accordingly, it is **ORDERED** that Petitioner's Motion to Abate (Instrument No. 102) is **DENIED** and that the two *Brady* issues on remand from the Fifth Circuit are also **DENIED**.

DONE at Galveston, Texas this 16th day of February, 2005.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ANTHONY GRAVES	§	
	§	
	§	CIVIL ACTION NO. G-00-221
	§	
DOUG DRETKE,	§	
DIRECTOR, TDCJ-CID	§	

FINAL JUDGMENT

For the reasons stated in this Court's Opinion and Order entered on the same date herewith, this action is **DISMISSED**.

THIS IS A FINAL JUDGMENT.

DONE at Galveston, Texas this 16th day of February, 2005.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ANTHONY GRAVES	§	
	§	
	§	CIVIL ACTION NO. G-00-221
	§	
DOUG DRETKE,	§	
DIRECTOR, TDCJ-CID	§	

ORDER

On March 14, 2005, Petitioner in the above-titled case filed a Notice of Appeal and an Application for a Certificate of Appealability from the Order and Final Judgment entered in this habeas corpus action on February 16, 2005. Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue only if Petitioner has made a substantial showing of the denial of a constitutional right. In accordance with paragraph 2253(c)(3), this Court must specify which issues satisfy the showing under subparagraph (c)(2).

After a thorough review of the record in this case, it is **ORDERED** that a Certificate of Appealability is **GRANTED** on the two issues remanded to this Court by the Fifth Circuit: (1) whether Petitioner's rights under *Brady v. Maryland*, 272 U.S. 83 (1963) were violated when the prosecution failed to disclose that Robert Carter claimed to have committed the murders alone, and (2) whether those same rights were violated by the failure to disclose Carter's statement that he committed the murders with this wife Theresa.

DONE at Galveston, Texas, this 17th day of March, 2005.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

FILE DATE
JUN 20 2006

No. 05-1568

*****

In The
SUPREME COURT OF THE UNITED STATES

*****

DOUG DRETKE, Petitioner

V.

ANTHONY GRAVES, Respondent

*****

RESPONDENT'S BRIEF IN OPPOSITION

****

(THIS IS A CAPITAL CASE)

****

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THIS IS A CAPITAL CASE

ISSUES PRESENTED

ISSUE NUMBER 1

1. Whether the court below erred in determining that Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecution allegedly failed to disclose that Robert Carter claimed to have committed the murders alone.

ISSUE NUMBER 2

2. Whether Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the prosecution's failure to disclose Carter's statements that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

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Issue No. 1 - Whether the court below erred in determining that Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated when the prosecution allegedly failed to disclose that Robert Carter claimed to have committed the murders alone.

Issue No. 2. - Whether Graves' rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated by the prosecution's failure to disclose Carter's statements that his wife Theresa "Cookie" Carter participated in the commission of the murders with him and Anthony Graves.

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RESPONDENT'S BRIEF IN OPPOSITION

TO

CERTIORARI

Respondent ANTHONY GRAVES respectfully submits his Brief In Opposition to certiorari being granted, pursuant to Supreme Court Rule 15 (1), asking the Court deny this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondent Graves was convicted of capital murder and sentenced to death in October, 1994, in the 23rd District Court of Brazoria County, Texas, on a change of venue from the 21st District Court of Burleson County, Texas. The conviction and sentence were affirmed by the Texas Court of Criminal Appeals (CCA). *Graves v. State*, No. 72,042 (Tex. Crim. App. 1997) (unpublished).

Graves' initial state application for writ of habeas corpus was denied by the CCA, with three judges dissenting. *Ex parte Graves*, ___ S.W. 2d ___ (Tex. Crim. App, No. 40,812, 1999) (unpublished). Two successor habeas actions, with amendments, were filed in state court, raising additional claims, with the Texas CCA granting review of one successor issue, eventually denying relief on that claim, with three judges dissenting. See *Ex Parte Graves*, 70 S. W. 3d 103 (2000). The remaining claims were

dismissed. *Ex parte Graves*, No. 40,812-2 (Tex. Crim. App. 1999); *Ex parte Graves*, No. 40,812-3 (Tex. Crim. App. 2000).

Graves filed his Section 2254 petition for writ of habeas corpus in the United States District Court, raising nine habeas corpus claims. ROA, pages 345, et seq. The District Court summarily denied relief and denied a COA. *Graves v. Dretke*, (S.D. Tex. No. G-00-221, Sep. 6, 2002) (unpublished).

On appeal of that ruling, the Fifth Circuit granted Graves' application for a Certificate Of Appealability (COA) on one of the *Brady* claims and remanded the claim to the district court for an evidentiary hearing, but denied the COA on the other issues. *Graves v. Dretke*, 351 F.3d 143 (5th Cir. Aug. 15, 2003). Graves filed a Motion For Rehearing, which resulted in the Fifth Circuit granting the rehearing as to one additional *Brady* claim, and also remanding that claim for an evidentiary hearing. *Graves v. Dretke*, 351 F.3d 156 (5th Cir. Nov. 13, 2003).

While the case was pending the scheduling of the evidentiary hearing, Graves sought a Writ Of Certiorari to the United States Supreme Court concerning the issues that had been rejected of the Fifth Circuit, but certiorari was subsequently denied. See *Graves v. Dretke*, ___ U.S. ___ (No. 03-8878, 2004).

In September, 2004, the evidentiary hearing on remand was conducted, and thereafter, the United States Magistrate issued a report

denying relief. ROA, pages 1554-73. Appellant filed voluminous Objections to the Magistrate's recommendation, ROA, pages 1584-1681, but the District Court adopted the Magistrate's findings. *Graves v. Dretke*, No. G-00-221 (S.D. Tex. Feb. 16, 2005) (unpublished). ROA, pages 1682-88. The District Court granted a Certificate Of Appealability and upon subsequent appeal to the Fifth Circuit, after briefing and oral argument, the Court of Appeals ordered a new trial. See *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006). The Texas Attorney General's office sought a stay of the Court of Appeals mandate, which was granted until April 24, 2006; however, no Motion For Rehearing was filed in the Court of Appeals.

The United States District Court has ordered the State of Texas to retry the Respondent and under the present amended scheduling order, such trial must commence on or before September 12, 2006. However, this certiorari petition was filed on May 31, 2006, and the Texas Attorney General's office is presently requesting that the United States District Court again delay the trial setting in this matter.

B. Facts Of The Case

While Petitioner cites the opinion of the Texas Court of Criminal Appeals' decision affirming the direct appeal in Respondent's case for factual support underlying their claims, Respondent would note that the subsequent years have reflected *other evidence* undermining the reliability of the original Court of Criminal Appeals' decision.

The only evidence that placed Graves at the crime scene was the testimony of Robert Carter, the self-confessed killer of the victims. District Attorney Sebesta has agreed that the state's entire case was based solely on Robert Carter's testimony, and therefore the credibility of Carter's testimony was critically necessary to sustaining the verdict against Graves. There was no other eyewitness testimony, fingerprints, DNA or other scientific evidence directly implicated Graves. S.F. Vol. 38:3749-50.

In addition to the *Brady* claims which resulted in the Fifth Circuit granting relief in this case, subsequent evidence produced reflected that shortly after Graves' conviction, Carter began informing other people that his trial testimony had been false, admitting that he committed the murders alone and that Graves was not present at the crime scene. Carter confessed his perjured testimony to his appellate attorney, Mary Hennessy, his federal habeas counsel, Bill Whitehurst; Graves' state habeas counsel, Patrick McCann; Graves' present federal habeas counsel Roy Greenwood; at least two other prison inmates, Alvin Kelly and Kerry Max Cook, and to his "second mother," Marilyn Adkinson, all who provided affidavits. See *Graves v. Cockrell*, No. G-00-221, *13 (S.D. Tex. Sep. 6, 2002) (unpublished). It was also brought to light that Carter had not informed his trial attorney, Dain Whitworth, in the two years that Whitworth represented Carter, that Graves was a participant in the murders. *Id.* at *14. See Habeas Exhibits Nos. 3, 6, 7, 8, 9 and 10, ROA Volume 3.

Further, as part of the federal habeas proceedings, a deposition to perpetuate the testimony of Robert Carter was taken on May 18, 2000, just thirteen days prior to his execution by the State on May 31, 2000. At that deposition, Carter repeatedly stated that he had told Sebesta and Ranger Coffman *that "it was all me, but you said you didn't want to hear it"*. Exhibit 1; ROA, Vol. 1:643-683. Finally, Carter also exonerated Graves in his final, "dying declaration" words prior to being executed: *"It was me and me alone. Anthony Graves had nothing to do with it. I lied on him in court."* *Graves v. Cockrell*, No. G-00-221, *14 (S.D. Tex. Sep. 6, 2002) (unpublished).

Other evidence indicated that Graves and Carter had no previous personal relationship prior to the murders, other than Carter having married Graves' cousin, Theresa "Cookie" Carter, and that after this marriage, Graves thereafter had little contact with his cousin. The alleged "motive evidence" submitted by the state, i.e., that Graves participated in the murders because he was angry that Bobbie Davis (one of the victims) had received a promotion that his mother wanted at the Brenham State School, was impeached by a number of other witnesses, including Respondent's mother and other school employees, who indicated that there were *no ill feelings* concerning any promotion decisions.

As to the evidence that Respondent's knife was *probably* the murder weapon, according to state's witness Travis County Medical Examiner Dr.

Bayardo and Texas Ranger Roger Coffman, the defense introduced substantial contradictory expert evidence questioning these conclusions. Initially, Dr. Robert Bux, Deputy Chief Medical Examiner for Bexar County, Texas, testified that the wounds suffered by the victims could have been inflicted by *any* single-edged knife with a blade at least two and one-half inches long and one-half inch wide. S.F. Vol. 41:4124. An in-court demonstration with other miscellaneous knives supported that conclusion. Furthermore, during the state habeas corpus hearing in 1998, noted forensic anthropologist Dr. Harrell Gill-King from the University of North Texas, concluded that the methods used by the Texas Rangers and Dr. Bayardo to compare the knife to the victims' skullcaps were not only "unreliable", but may also have destroyed the *original* evidence. State Habeas Hearing, Vol. 2. The knife, given to Graves by his employer several years before, was never located. Further, Robert Carter admitted that he had final possession of the knife used in the murder, claiming in prior statements and testifying that **he** disposed of the murder weapons used in the offense.

While the State had introduced testimony from three jail workers during the trial regarding purported incriminating jailhouse conversations heard over the jail intercom between Carter and Graves, such evidence was subsequently shown to have been unreliable. Of the three jail workers (Eldridge, Robertson and Beal) it was shown that *none* of them had the

ability to identify the voices of either Carter or Graves, especially over the loud jail fan, the television noise and continuous inmate racket going on in the jail facility. On direct appeal, the Court of Criminal Appeals found that because a proper foundation had not been laid for identifying Respondent's voice, the testimony of one of these jail witnesses was erroneously admitted. However, because objections had not been made as to the other two employees' testimony, the CCA concluded that any error was harmless. See *Graves v. Texas*, ___ S.W. 2d ___ (Tex. Crim. App. No. 72,042, 1997) (unpublished).

In addition to the above evidence reflecting unreliability of the state's case in chief, subsequent proceedings have showed that the defense trial presentation was flawed in a number of respects. For example, the defense's main alibi witness, Yolanda Mathis, who had testified to the grand jury that Graves was with her at his apartment in Brenham on the night of the murders, did not testify. It was discovered that just before Mathis was scheduled to testify, District Attorney Sebesta surprisingly advised the judge that Mathis was now a "suspect" in the case and could be indicted for her role in this capital murder case. As later shown by the evidence, these threats were legally and factually baseless. Some 12 years later, Mathis has *never* been questioned or charged for the Davis' family murders, or for perjury, and she continues to affirm that she was with Graves that night at his apartment. After defense counsel informed

Mathis of Sebesta's threat, Mathis became "petrified" with fear, cried, and refused to testify. S.F. Vol. 45:57-61; S.H.R. Vol. 1:19-21.

However, trial counsel failed in their responsibility to protect Respondent's rights by securing the testimony of Mathis, denying the jury this critical alibi evidence due to these invalid and baseless threats. Evidence presented at the state habeas corpus hearing reflected that Sebesta presented *three* (3) different legal theories for contending that Mathis was a "suspect" in this case, but none of them were *legally* valid under Texas law, and Sebesta's explanations were in conflict with each other.

In addition, subsequent habeas corpus records reflect that trial counsel failed to interview and call other vital alibi witnesses. It was shown that Graves' original attorney, Dick DeGuerin, had obtained a number of potential witnesses who were willing to support the alibi defense, yet were not called by trial counsel for inexplicable reasons (See E.H.T. Vol. 3, Exhibit 23 (the Dick DeGuerin Files); ROA, pages 722-746).

Thus, Respondent would submit that any analysis of the *original* Texas Court of Criminal Appeals opinion affirming the conviction must be viewed with suspicion as to its reliable determination as to any of the facts of this case.

REASONS FOR DENIAL OF CERTIORARI

Introduction

The Fifth Circuit granted relief based upon the prosecution's suppression of relevant, material and exculpatory evidence from the defense, dealing with two separate statements made by Robert Carter to prosecuting attorney Sebesta, neither of which which were disclosed to the defense.

Even though the Petitioner sets forth two separate issues presented for certiorari review, Respondent submits that those two separate issues cannot *truly* be separated for review, as the Fifth Circuit reviewed both suppressed statements in violation of the rule of *Brady v. Maryland,* 83 S.Ct. 1194 (1964), and concluded that the statements, both *individually*, and *in combination with each other*, deprived the Respondent of a fair trial. For this reason, Respondent will not attempt to segregate his arguments into the "dual claim format" presented by Petitioner.

Respondent's Reply To Certiorari Issues

It is to be immediately noted that Petitioner, at page 1, commences this Petition by stating as follows: "*The lower court's decision* ***does not conflict*** *with various state courts of last resort or United States Courts of Appeals.*" (emphasis supplied). There is no allegation that the specific mandate of any United States Supreme Court authority was violated.

Therefore, it appears that Petitioner concedes that there are no disputed questions of law, or conflicts among jurisdictions or circuits, nor any novel or unusual legal questions presented by the Court of Appeals' analysis of this case. As Respondent understands the Petitioner's concession, the Court of Appeals' analysis of this case was proper under this Court's previous decisions. See *Banks v. Dretke*, 540 U.S. 668 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Giglio v. United States*, 405 U.S. 150 (1972); *Strickler v. Greene*, 527 U.S. 263 (1999); *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Augurs*, 427 U.S. 97 (1976); *Alcorta v. Texas*, 355 U.S. 28 (1957); *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, supra. Why then should certiorari be granted?

As witnessed by the continuous nine-year history of habeas corpus litigation in this matter, the instant case is driven by a particular, unusual and clearly *novel* set of factual circumstances, which do not fall appropriately under the normal guidelines for certiorari being granted. See *Kyles v. Whitley*, at 456 (Justice Scalia's dissenting opinion, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas), wherein it was stated:

"The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally....be denied. *United States v. Johnston*, 268 U.S. 220, 227 (1925). That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, *Sumner v. Mata*, 449 U.S. 539, 543 (1981).....We carefully considered whether the convictions and

sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately,* to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise."(emphasis supplied)

Petitioner's arguments in support of a grant of review constitutes a request for the Court to become enmeshed in a *reanalysis* of nine (9) previous years of *fact intensive* habeas corpus litigation, where the state courts of Texas completely abdicated their responsibility for appropriate habeas corpus review, requiring the Fifth Circuit Court of Appeals to properly apply the law to the facts in granting relief.

Further, the Court of Appeals' *Brady* analysis, while granting Respondent relief, did not consider the substantial evidence of *actual innocence* submitted by Respondent in this case, as the Fifth Circuit refused to consider Respondent's "freestanding" habeas claim of innocence during the original habeas review under *Herrera v. Collins*, 506 U. S. 390 (1993). See *Graves v. Dretke*, 351 F.3d 143 (5th Cir. 2003). Cf. *House v. Bell*, 547 U.S. ___ (04-8990, June 12, 2006).

In the instant case, both claims upon which habeas relief was granted went to Respondent's assertions of his actual innocence, as summarized below:

(1) Petitioner's first claim on certiorari involves a situation wherein Robert Carter *exonerated* petitioner and asserted that he committed the murders himself *alone*, but where such evidence was suppressed from the defense.

Even though Petitioner claims that Respondent's habeas attorneys "*first learned of Carter's statement, "I did it all myself," in 1998...*" (Certiorari petition, page 8), this is not quite incorrect. It is undisputed that Respondent's counsel first obtained corroboration of Carter's exculpatory statement allegedly made to District Attorney Sebesta, when Sebesta participated in several media interviews in June, 2000, admitting that Carter had made the exculpatory statement. Sebesta related during the federal evidentiary hearing that he had totally forgotten about such exculpatory statements until after Carter's testimony during the federal deposition on May 18, 2000. Such admission was clearly exculpatory, especially when made by the state's critical witness against Respondent.

(2) Petitioner's second claim on certiorari involves a situation where Carter implicated his wife, Teresa "Cookie Carter", as being a participant in the murders, also suppressed from the defense, in violation of the trial court discovery orders and contrary to Robert Carter's perjured *trial* testimony *denying* her involvement. Respondent's counsel first learned of this admission by Carter during District Attorney Sebesta's state habeas corpus evidentiary hearing testimony in November, 1998.

Petitioner claims that Carter named his wife as a participant on *only one occasion*, while *also* implicating the Respondent; however, this is also not quite correct. District Attorney Sebesta first made this admission during the state habeas hearing, and Petitioner stipulated to this *prior testimony* during the federal evidentiary hearing.

However, subsequent evidence produced on habeas corpus indicated that Carter implicated his wife on *at least one other occasion*, during a polygraph session conducted on October 21, 1994, wherein Respondent was *not mentioned* at all within the polygraph operator's interview report. Respondent's position throughout was that Sebesta's state habeas testimony constituted only a "summary" of Carter's statements made during a *six hour* interview, and was not a direct quote by Carter at any time during that session. At the time Sebesta made this "admission" during the state habeas hearing, some four years after the trial, no issue had been "joined" concerning the failure to make such disclosure, as it was only later did Respondent submit a successor habeas petition raising this claim under *Brady*. The State "stipulated" that Sebesta had given this previous testimony, but did not directly assert during the federal evidentiary hearing that such *quoted* statement from Carter was ever *actually* made, or was the only time that Carter implicated his wife.

The Court of Appeals properly reasoned that both suppressed statements had to be considered "*in combination*" with each other, under

the facts of the case, where the overwhelming evidence of Carter's intent was to attempt *to protect his wife* from prosecution, and the only way to do that was to name a *third-party* as his codefendant, which in this case was the *Respondent*.

The Court of Appeals properly concluded that the exculpatory evidence suppressed under *Brady*, *Kyles* and *Banks*, in conjunction with a showing of *additional* acts of prosecutorial misconduct, *aggravated* the harm suffered by Respondent as a result of the admitted acts of suppression, thus depriving Respondent of a fair trial. Because it is critical to recognize the impact of these additional acts of prosecutorial misconduct, the findings of the Court of Appeals should be quoted directly, to wit:

1. "Footnote[4] - District Attorney Sebesta contradicted Graves' counsel and testified at the habeas hearing that he told Graves' defense counsel Garvie of this statement outside the courtroom the morning after Carter made the statement. **The district court did not find Sebesta credible on this point."** (emphasis supplied) Slip Opinion, p.11.

2. "**Perhaps even more egregious** than District Attorney Sebesta's failure to disclose Carter's most recent statement is his deliberate trial tactic of eliciting testimony from Carter and the chief investigating officer, Ranger Coffman, that the D.A. knew was false and designed affirmatively to lead the jury to believe that Carter made no additional statement tending to exculpate Graves..... Sebesta clearly knew of the statement and used Ranger Coffman as well as Carter to present a picture of Carter's consistency in naming Graves that Sebesta **clearly knew was false**." (emphasis supplied) Slip Opinion, p.13.

3. "The state stipulated that Carter told Sebesta, "Yes, Cookie was there; yes Cookie had the hammer." This statement was also made the night before Carter testified in Graves' trial. Sebesta did not inform

Graves' counsel of this statement." (emphasis supplied) Slip Opinion, p.14.

4. "However, Sebesta's statement did not reveal or even imply that Carter gave a statement affirmatively naming Cookie as an active participant in the murders. The defense had specifically requested any information related to any party, other than Graves and Carter, who the state alleged was involved in the crime." (emphasis supplied) Slip Opinion, p.15.

5. "Sebesta's response to the defense's discovery request was that "there were some names that were given" to the State, but that "[t]hey're not necessarily parties to the crime but they are people who may have - may possibly have some information on those." Sebesta's questioning of Carter at Graves' trial about Cookie's involvement also reinforced defense counsel's belief that she was involved, if at all, after the crimes were committed. (emphasis supplied) Slip Opinion, p.15.

6. "Carter's testimony was obviously different than the statement he gave Sebesta the previous night that Cookie was there and Cookie had the hammer. " (emphasis supplied) Slip Opinion, p.16.

7. "We view Sebesta's statement regarding the polygraph, his discovery responses and questioning of Carter as **misleading and a deliberate attempt to avoid disclosure of evidence** of Cookie's direct involvement. At a minimum, Sebesta's minimal disclosure was insufficient to put the defense on notice to inquire further, particularly in light of the state's discovery disclosure."(emphasis supplied) Slip Opinion, p.16.

8. "The statement regarding Cookie's direct involvement in the crime is exculpatory for several reasons." Slip Opinion, p.17.

9. "Because the state suppressed two statements of Carter, its most important witness that were inconsistent with Carter's trial testimony, and then presented false, misleading testimony at trial that was inconsistent with the suppressed facts, we have no trouble concluding that the suppressed statements are material." (emphasis supplied) Slip Opinion, p.20.

In addition, the Court of Appeals noted how the result of Graves' trial could have been altered to Graves' *benefit*, had the acts of misconduct not occurred, to wit:

1. "If the defense had known about the statement placing Cookie at the scene and given Carter's continuing condition that he would only testify if he were not asked about Cookie's involvement, the defense could have explained every statement implicating Graves as a means of protecting Cookie. As indicated above, these statements are particularly important in this case because Graves' conviction rests almost entirely on Carter's testimony and there is no direct evidence linking him with Carter or with the murder scene other than Carter's testimony. In addition, Carter's statement that he committed the crimes alone is important as the only statement he made exculpating Graves while implicating himself. "(emphasis supplied) Slip Opinion, p.20.

2. "If the two statements had been revealed, the defense's approach could have been much different (as set forth above) and probably highly effective." (emphasis supplied) Slip Opinion , p.18.

3. "If both statements had been timely furnished to Graves, he could have persuasively argued that (1) the murders were committed by Carter alone or by Carter and Cookie; and (2) Carter's plan from the beginning was to exonerate Cookie, but a story that he acted alone was not believable, so he implicated Graves so the prosecution would accept his story and decline to prosecute Cookie." (emphasis supplied) Slip Opinion , p. 18.

4. "If Graves had been furnished with Carter's statement, it could have provided him with an argument that those two persons were Carter and his wife rather than Carter and Graves....Also, Carter's statement, placing Cookie directly at the scene and actively involved in the murders, puts his deal with the state to testify only on the condition that he not be questioned about Cookie's involvement in a different light. It provides a stronger argument to Graves that Carter was lying about Graves involvement to save Cookie. (emphasis supplied) Slip Opinion, p.17.

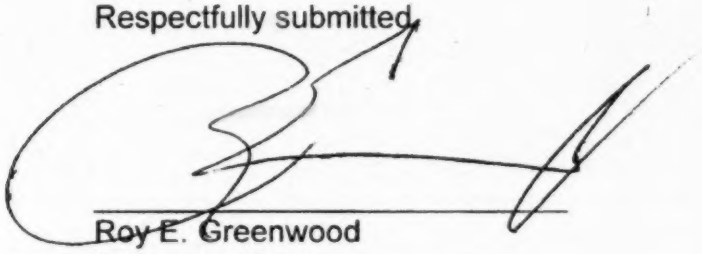
5. "Given the number of inconsistent statements Carter had given, the state faced a difficult job of persuading the jury that Carter was a credible witness, **even without the suppressed statement**. Had the defense been able to cross-examine Carter on the suppressed statement,

this may well have swayed one or more jurors to reject Carter's trial version of the events." (emphasis supplied) Slip Opinion, p.12.

The quoted findings of the Court of Appeals are clearly supported by the evidence. Respondent submits that the arguments posited by Petitioner, which constitute the exact same arguments presented to the Court of Appeals below, have been rejected in a reasonable analysis by the Fifth Circuit. Since there is no claim of any conflict of precedent, or any novel procedural question presented, Respondent requests that this certiorari petition be denied.

WHEREFORE, premises, considered, Respondent prays that the Petition for Certiorari be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and a correct copy of the above and foregoing document was served upon the Texas Attorney General's Office, by first class mail on the 20th of June, 2006.

ROY E. GREENWOOD